Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ or Certiorari to the

Supreme Court of Virginia

APPENDIX - VOLUME II

APPENDICES X THROUGH CC

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1638

APPENDICES — TABLE OF CONTENTS

VOLUME II

APPENDIX X

Transcript of hearing in Virginia Trial Court on Defendant's Motion to Suppress Evidence seized in violation of the Fourth Amendment.....200

APPENDIX Y

Transcript of evidentiary hearing in Virginia Trial Court on Defendant's standing to assert the Fourteenth Amendment..241

APENDIX Z

Motion To Suppress Evidence and Memorandum of Points and Authorities in Support Thereof.....324

APPENDIX AA

Commonwealth of Virginia's Response to Motions to Suppress.....330

APPENDIX BB

Transcript of hearing in Virginia Trial Court on Defendant's Motion regarding the Extradition Treaty.....336

APPENDIX CC

Transcript of hearing in Virginia Trial Court on Defendant's Motion regarding the Vienna Convention.....345

APPENDIX X

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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COMMONWEALTH OF VIRGINIA, :

vs. : CRIMINAL NO.79148

MIR AIMAL KASI :

a/k/a MIR AIMAL KANSI, :

Defendant. :

----------x

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

PARTIAL TRANSCRIPT

(The Court Reporter was sworn.)

THE COURT: Okay. You have motions today?

MR. GOEMANN: Yes, Your Honor. Does the Court have any preference in terms --

THE COURT: No. Just let me know what we're arguing is all.

MR. GOEMANN: Your Honor, first --

MR. HORAN: Your Honor, I wonder, if we might, in the interest of time. On some of these motions, I will stipulate to exactly what the allegations are of the defense in this case.

I will stipulate for purposes of argument on this record that the Defendant was arrested in Pakistan by an FBI agent; for purposes of this record I will concede that the FBI agent doesn't have any jurisdiction in the nation of Pakistan; that he was not taken before a judicial officer as was alleged in Ms. Meleen's motion until he returned to the United States and was presented before this Court.

That in the course of time from his arrest until he was brought to this country there was no compliance with the Vienna Convention until my letter of July 3rd,

that counsel for the defense, as is alleged in Ms. Barger's motion.

And that the seizure in Pakistan was not made pursuant to any Pakistani paper or document which would allow him to be seized under the laws of Pakistan.

Your Honor, I make that stipulation because I would suggest to the Court that on three of the four motions they are legal argument, really. I will stipulate the underlying facts of the legal argument on each of those is proper which would leave us with the fourth motion to suppress, which is Mr. Goemann's motion which deals with Miranda and voluntariness.

MR. GOEMANN: Your Honor, could I ask for a brief recess to talk with my co-counsel about these stipulations and the affect they might have on the motions we have presented today? This is the first I'm hearing about it and I'd just like a brief recess to --

THE COURT: Okay. We'll take a five minute recess.

MR. GOEMANN: Thank you.

(Brief recess.)

THE COURT: Something that occurred to me while I was out there in terms of time is I don't know whether

PAGES REGARDING OTHER MATTERS EXCERPTED

Okay. So, she may go and I think then we're on with your --

MR. GOEMANN: Your Honor, there was one other quick preliminary matter, motion for change of venue. I'd be asking that that be continued to the 27th. We've just received some more video tapes over the weekend and I haven't had a chance to review them.

THE COURT: Any objection to continuing that to the 27th?

MR. HORAN: No, Your Honor.

THE COURT: Okay.

MR. GOEMANN: Thank you. With respect to the other motions, Mr. Horan's stipulations certainly do make things a bit easier on each of them. But ultimately we've come to the conclusion that we don't believe they resolve any of them completely, at least without taking up some evidence.

The first one, and this might be almost the simplest one in a way is the motion to suppress evidence based on the illegal seizure.

Mr. Horan's -- so I'd like to take that one up first, Your Honor, on the 4th Amendment grounds.

THE COURT: Okay. I'm not -- when you file

these, I'm not sure what specific -- I want to know that I've got the right motion in front of me. So how about coming up here and finding me the motion you're talking about.

MR. GOEMANN: Yes, Your Honor.

THE COURT: If you're talking about a discreet motion so I know which one you're arguing. There's some overlap in all these, I understand. But I want to know what motion I'm dealing with.

MR. GOEMANN: This would be the first one (indicating.)

THE COURT: Okay. This is titled motion to suppress evidence and begins in paragraph one stating sometime in June of 1997 the Defendant was abducted.

MR. GOEMANN: Yes, Your Honor.

THE COURT: That's the motion.

MR. GOEMANN: And the gist of the motion is that Mr. Kansi was seized in an unreasonable fashion. That he was in Pakistan, which is -- has been stipulated now by the Commonwealth, and that his seizure was a violation of both the laws of the United States and of Pakistan. And the laws that were violated were the extradition treaty that existed between the United States and Pakistan, and

the individual statutes regarding extradition that exist in the United States and in Pakistan, and I attached a copy of the Pakistani statute to my motion and cited the actual treaty in the United States and the extradition statute in the United States, at 18 U.S.C 3181.

I do have a copy of the treaty itself, if the Court -- which I'd just like to hand up.

THE COURT: All right.

(Mr. Goemann hands a document to the Court.)

THE COURT: Can I see if I can narrow this a little bit.

Put aside for the moment the Constitution. All right. And just focus on the treaty. Are you suggesting that if there is a violation of a treaty, a motion to suppress stands on that basis?

MR. GOEMANN: No.

THE COURT: So we all agree, then, that a treaty is like -- is like a law and there is no -- if it does not rise to the level of a constitutional violation, a violation of a treaty, as a violation of law, unless it specifically states, does not give rise to a dismissal of the indictment or a suppression of the evidence.

MR. GOEMANN: Well, I want to withhold making

any statement regarding dismissal of the indictment. There's another motion pending regarding that.

THE COURT: All right. Doesn't rise to the level of suppressing evidence.

MR. GOEMANN: That's correct.

THE COURT: And the same thing with regard to -- well, is it just the treaty you're relying on or --

MR. GOEMANN: The treaty and the extradition acts of the United States and Pakistan.

THE COURT: The extradition acts of the United States would not be a basis in and of themselves for a suppression of evidence.

MR. GOEMANN: That's correct, Your Honor.

THE COURT: The extradition act of Pakistan is or is not in and of itself?

MR. GOEMANN: Is not.

THE COURT: All right.

MR. GOEMANN: In and of itself.

THE COURT: Then your argument is that all those things taken together with the facts and circumstances of how he was abducted give -- violate his 4th amendment right.

MR. GOEMANN: That's correct, Your Honor.

THE COURT: And how does he come within the protection of the 4th amendment right? How does he come within the 4th amendment? Who is he that allows him to claim protection of the 4th amendment?

MR. GOEMANN: He is a person that was seized by the United States and by the Commonwealth of Virginia in Pakistan.

If the Commonwealth wants to argue that he, the person who was seized, is not a person protected by the 4th amendment to the United States Constitution, I believe it's up to the Commonwealth to show that.

THE COURT: I think it's the other way around.

MR. GOEMANN: Well, Your Honor, if I may --

THE COURT: I think you've got to show that he is a person who is entitled to that protection in Pakistan.

MR. GOEMANN: Your Honor, if the Court's position were correct, a preliminary showing in virtually every motion to suppress that we litigate would be a presentation of a birth certificate or a passport.

THE COURT: No. Because if it's in this country, then that might be the basis for it. But you have someone who was -- who was -- something was done to

in a foreign country and I think if you're going to claim that that person is entitled to the protection of the laws of this country or the constitution of this country, the burden's on you to show some -- something that brings him within that purview under the law.

MR. GOEMANN: Your Honor, I believe that the Supreme Court case of Reid, R-E-I-D versus Cobert, C-O-B-E-R-T, 354 US 1 1957, says that the location of the seizure doesn't matter in terms of whether the 4th amendment applies or doesn't apply. So I don't think that -- and in that case there was a seizure outside of the country. And so the mere fact that this occurs outside of the United States does not take the Defendant outside of the protections of the Constitution.

There is no evidence -- I think that the Commonwealth has to show that this person that they seized, if they seize someone and they want to claim that that person is not entitled to the protections of the Constitution, they have to show it. Just like in an immigration case, and of course this is an in exact analogy, but in a deportation proceeding it's up to the government to show alienage, and I think that's basically what we're talking about here.

But in a deportation case, the government has to show that the person being deported -- and they have to show it by clear and convincing evidence is an alien and then it would be up the Defendant in that case to come forward with some evidence to show that despite being an alien, they have the right to be present. But it's up to the government.

And this is the same idea. In each case the government is trying to strip the person that they have brought before the Court of rights and the default position, I suggest, is that when the government seizes somebody and brings them into court the constitution applies to that person. That in essence is the underlying assumption. That's the assumption that we start out with. And if the government wants to take the person out of that category, after they seize them, they have to show.

In addition, Your Honor, it makes sense in terms of who has the information regarding this. Citizenship or a person's status, vis-a-vie the government, is a construct of the government. So whether a person is a citizen or an alien or a permanent resident or has a work permit, those are all statuses created by the government. They're not something that is subjective from the

individual. It's not something you're born with, it's not something that the individual creates by their mere presence.

Here we have a person who was seized by the government, and if the government wants to show that one of these constructs, these categories that they have created take the Defendant outside of the protection of the constitution, then it only makes sense that they should be the ones to show which of these constructs applies and why does it rob the Defendant of the protections of the constitution. And I think Reid makes clear that it really doesn't matter where it takes place.

The operative point is that the government of the United States is the one that made the seizure. And there are some Circuit Court opinions that talk about the 4th Amendment applying to a particular case and the threshold question is does the 4th Amendment apply, and the exclusionary rule apply to a seizure in a foreign country.

And there are two ways that it can apply. And, Your Honor, I would cite the Court to a 9th Circuit case, United States versus Barona. And I do have copies for the Court and Counsel.

And Barona is helpful because it lays out a -- a system for approaching these cases. In Barona there are basically wiretaps, foreign wiretaps and defendants are brought to the United States and prosecuted based on wiretaps that occur in Denmark.

And I would cite to the Court to -- beginning at page 1090 under A. The general proposition is that seizures that occur in foreign countries -- the 4th Amendment does not apply. However, we have stipulations here which get us over that hurdle.

And the two exceptions that the Court talks about is first, if the circumstances of the foreign search and seizure are so extreme that they shock the judicial conscience, than an appellant court can exercise its supervisory powers. That's one exception.

The other exception is if there is a joint venture between the United States and foreign officials in the seizing of the person.

So the threshold question is not what is the status of Mr. Kansi, but did the United States government go over and seize someone.

And the stipulations that have been entered into already, I believe, clearly show that. That the FBI did

-- arrested a Pakistan -- Mr. Kansi was arrested in Pakistan by FBI agents.

On the second column on page 1091, talks about the second exception to the inapplicability of the exclusionary rule applies when the United States agent's participation in the investigation is so substantial that the action is a joint venture between the United States and foreign officials.

Well here, there's no question if -- and if a joint venture is found to have existed, the law of the foreign country must be consulted at the outset as part of the determination whether or not the research -- excuse me, the search, was reasonable.

So the first question is did the United States engage in a joint venture with the Pakistan government, or at least a joint venture.

And here, I believe the stipulation -- more is adequate to establish that.

THE COURT: I didn't hear that. I missed that.

MR. GOEMANN: Mr. Horan, the first stipulation was that Mr. Kansi was arrested in Pakistan by FBI agents.

THE COURT: Yes. What does that tell me about cooperation with Pakistan?

MR. GOEMANN: What this is going to is not how much Pakistan was involved, but how much was the United States involved.

THE COURT: I thought you said that you were talking about a joint venture between this country and Pakistan.

MR. GOEMANN: Well, at least --

THE COURT: Which is what this case seems to say. If a joint venture is found if exists then the law of the foreign country must be consulted and so on and so forth. I didn't hear a stipulation with regard to the cooperation by the government of Pakistan.

MR. GOEMANN: Your Honor, I don't think that's required. I think what they're talking about in this case is the foreign government's sole action versus action solely on the part of the United States.

And in order to invoke the 4th Amendment, there has to be some minimal participation by the United States, not by the foreign government.

It's sort of -- and when they're talking about a joint venture, what they're saying is the United States must have participated at least to the point where it becomes a joint venture. In other words, it can't be

solely the Pakistani authorities that are acting here. If the Pakistani authorities were the only ones who acted they created the seizure, then this doesn't apply.

THE COURT: I'm not following your argument way back a moment ago. Because I thought you told me that it's your argument that the 4th Amendment has extra territorial effect.

So you're not dealing with whether there's an exception to the non-applicability or not, your argument is that the 4th Amendment has extra territorial effect, and the government has to follow it in Pakistan.

This case says that omnibus crime act does not have extra territorial effect and then they get into the exceptions being one where it shocks the conscience; and two, where it's a joint venture. So how you're getting from point A to point B is beyond me.

MR. GOEMANN: I'm sorry, Your Honor. Let -- what I'm saying is under the circumstances of the case, when the FBI goes to a foreign country and seizes somebody and brings it back to the United States, then the second exception applies and the --

THE COURT: The second exception to what?

MR. GOEMANN: The exception to the rule that the

4th Amendment does not normally apply outside of the United States.

THE COURT: So there is -- we agree there is a rule, then, that the 4th Amendment does not ordinarily apply outside the United States and we're back to my question to you, how do you bring him within the protection, and you said you don't have to, but now you say, yes, you do because you agree he doesn't -- it doesn't apply outside the United States, and you're trying to come within an exception to that general rule.

Is that where we are?

MR. GOEMANN: No, Your Honor, I'm sorry --

THE COURT: No.

MR. GOEMANN: There are two separate questions regarding whether the 4th Amendment applies. One is does the 4th Amendment apply to this seizure. And the second is is this person someone who is someone protected by the 4th Amendment.

THE COURT: So are you saying it doesn't apply to this seizure generally because it was outside the United States, and you want to come within an exception to that general rule, is that what you're saying?

MR. GOEMANN: Yes. In other words --

THE COURT: Okay. So we agree that -- forget the person for a moment. The 4th Amendment has no extra territorial effect unless, and you're arguing there are two exceptions.

MR. GOEMANN: Yes.

THE COURT: Is that why we're getting to where you are?

MR. GOEMANN: Yes, Your Honor.

THE COURT: Okay.

MR. GOEMANN: Thank you for the directions.

THE COURT: I'm not giving you directions. I'm trying to --

MR. GOEMANN: No, no.

THE COURT: -- understand what you're saying. I understand things by talking back.

MR. GOEMANN: I appreciate --

THE COURT: Some people really can't gather that.

MR. GOEMANN: -- your guidance in helping me to focus the argument. Yes. The 4th Amendment -- if a foreign country seizes somebody the 4th Amendment of the United States has no effect over there.

THE COURT: Well, suppose the FBI seizes

somebody in the foreign country. Generally, does the 4th Amendment apply?

MR. GOEMANN: Yes.

THE COURT: Well, then, why do you need an exception to the 4th Amendment to get you within it?

MR. GOEMANN: Because there are situations where the FBI or the United States government is not the person that is -- is not the --

THE COURT: Well, here it is the FBI so you don't need to talk about any exceptions, right? You just automatically -- the Constitution applies -- I mean, the 4th Amendment applies because he was seized by the FBI as the stipulation said. Is that right?

MR. GOEMANN: Well, I would say that the seizure by the FBI brings him within this number two, this second exception, that is --

THE COURT: Second exception to what?

MR. GOEMANN: To the normal rule that the 4th Amendment does not apply outside of the United States.

THE COURT: So when a person is seized by the FBI in a foreign jurisdiction under normal circumstances the 4th Amendment does not apply but it does apply in two exceptions, one of which is where there's cooperation of

governments?

THE COURT: Is that the argument?

MR. GOEMANN: No, Your Honor.

THE COURT: No.

MR. GOEMANN: The 4th Amendment does not apply if -- if somebody other than a United States agency --

THE COURT: Well, we know that's not this case because Mr. Horan stipulated.

MR. GOEMANN: That's right.

THE COURT: So is it --

MR. GOEMANN: That's the general rule. That's the general rule.

THE COURT: But never mind the general rule because the general rule doesn't apply here because it was the FBI.

MR. GOEMANN: That's right. So that does bring it within the exception to the general rule.

THE COURT: What exception?

MR. GOEMANN: The exception that if the government does at least participate in the seizure --

THE COURT: Where do you get that exception out of this case? This case says if a joint venture is found to have existed, the second exception applies when the

United States' participation is so substantial that the action is a joint venture. It's what it says at paragraph three, marked three and four on page 1091.

MR. GOEMANN: Yes, Your Honor. And what that is -- what that is guarding against is a lack of the United States involvement. A lack of United States involvement. That -- what that exception is talking about is if the United States has to have some involvement in this seizure for the United States Constitution to apply, and it has to rise up to the level of at least a joint venture.

In other words, if the FBI -- let's take the most -- the most extreme example of the general rule. Pakistani authorities make the arrest and the FBI has nothing -- the United States has nothing to do with it. They just turn him over. The Pakistani authorities did it all. The general rule would apply. The 4th Amendment does not apply there and there's no protection.

Now what if the FBI gave some information to Pakistan to lead them to make the arrest. Well, there's some United States involvement in that. Does that rise to the level of a joint venture? Well, I think that's a question of fact.

What if the FBI went over to Pakistan and

directed Pakistani agents on how to make the arrest. Is that -- does that rise up to the level of a joint venture.

See, the more the FBI or --

THE COURT: What if the FBI goes over there without any -- by your leave of the Pakistani government at all and does all itself?

MR. GOEMANN: Well, then I think that it clearly applies because then you have an arrest -- the seizure being made by a United States government agents.

THE COURT: Well, then why would we look to the law of Pakistan, which is what this case says we do?

MR. GOEMANN: To see if the United States -- if it was reasonable for the United States agents to go in and violate another country's laws.

THE COURT: Do you got any other case than this one? This case talks solely about joint venture and I am -- are we going to get some evidence somewhere? Am I just hearing an opening statement or are you making your argument? I don't know whether we're --

MR. GOEMANN: Well, Your Honor --

THE COURT: I only know what I have before me, so --

MR. GOEMANN: The Court's indulgence, I do have

another case here, Your Honor. I'm trying to see if --

THE COURT: Well, what I want to know, first, is whether you're talking -- whether you're just arguing -- whether you're arguing the whole case now or whether I'm going to hear some evidence and I ought to be quiet until at least I hear all the evidence. You probably think I ought to be quiet, period. You won't get that.

MR. GOEMANN: Well, Your Honor, I guess I'm trying to see if we need evidence. Let me quote from this case, Your Honor. It might elucidate this a bit more. And here they're talking about the limited exceptions.

Generally, neither our 4th Amendment nor the judicially created exclusionary rule applies to acts of foreign officials.

There are only two very limited exceptions to this general principle. First, if American law enforcement officials participated in the foreign search or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked.

Second, if the circumstances of the foreign search and seizure are so extreme that they shock the judicial conscience, a federal appellate court, in the

exercise of its supervisory powers can require exclusion of the evidence.

And my argument, I suppose, concerning the language in Barona is based upon that -- that background. Barona cites to this case, which is United States versus Lachapelle, L-A-C-H-A-P-E-L-L-E, 869 F 2d 488, that's another 9th Circuit case from 1989.

Barona, I suggest, simplifies the language, or in our case, actually, complicates it greatly, I suppose. But first, if the American law enforcement officials participate in the foreign search or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be evoked.

That, I believe, is what they're talking about when they say it has to be at least a joint venture in Barona. So if the FBI -- if things are being done at the direction of the FBI, then the 4th Amendment and the exclusionary rule apply.

And in this case, they were being done by more than just the direction of the FBI, they were actually being done by the FBI. So I don't see how there could be any question that the 4th Amendment governs our own

government agents going into other countries. And I believe Lachapelle and Barona clearly state that.

Now if that is true, then we get to the question of whether Mr. Kansi is a person that is protected by the 4th Amendment protections.

Now, I -- it was my contention that there wasn't need for the taking of evidence on this particular point because this stipulation sufficed to show that the United -- agents of the United States were participating in the seizure to such an extent as to -- as to require the applicability of the 4th Amendment. If the Court does not find that sufficient, then I think then there is going to need to be evidence.

THE COURT: If I don't find what to be sufficient for what?

MR. GOEMANN: That Mr. Kansi was arrested in Pakistan by FBI agents, if that is not sufficient to cross this -- this threshold to show that law enforcement officials participated in the foreign -- this says search, but I submit it's search or seizure, if that is not sufficient -- if that stipulation isn't sufficient to show their participation, then I suppose that evidence is going to be required. I suggest to the Court that it does.

THE COURT: Well, suppose it was and you get beyond the threshold question of the 4th Amendment applying, is there going to be some evidence about what happened? How do I know any -- there was any violation of the 4th Amendment from the stipulation?

MR. GOEMANN: The violation --

THE COURT: What does the stipulation tell you about that? Factually whether there was a violation.

MR. GOEMANN: It doesn't, Your Honor --

THE COURT: So we're going to have evidence on that.

MR. GOEMANN: Well, first Mr. Horan defends -- defends this issue not on whether the search itself was unreasonable or not but whether Mr. Kansi is a person --

THE COURT: Well, surely, I would have to find something with regard to the unreasonableness of it. Wouldn't I? If I agreed that the 4th Amendment applied --

MR. GOEMANN: Yes.

THE COURT: Surely I would have to find -- then I would get to the factual question, was the seizure unreasonable.

MR. GOEMANN: And I think the Commonwealth has the burden of proof of that, Your Honor. They have

stipulated that the seizure in Pakistan was not pursuant to any Pakistani paper or document and there is no -- there's nothing that I've seen in this case that would allow his seizure in Pakistan, pursuant to a warrant issued by this Court. And a capias, of course, is not -- does not operate outside of the boundaries of the jurisdiction. So what we have here is a warrantless seizure, and the burden of proof therefore is on the Commonwealth to show that it was reasonable.

THE COURT: Why doesn't the warrant apply outside the United States?

MR. GOEMANN: Your Honor, the -- if I may, there's a Virginia statute, 19.2-236, when process of arrest in a criminal prosecution is issued from a court, either against the party accused or a witness, the officer to whom it directed or delivered may execute it in any part of the Commonwealth.

THE COURT: Okay. So you say that -- it does not have any extra-territorial affect beyond Virginia is your argument.

MR. GOEMANN: Yes, yes.

THE COURT: Okay.

MR. GOEMANN: So there would need to be some

other process to show that it was -- that there was some sort of warrant to something to shift the burden back. But other than that, the Commonwealth would have the burden of showing that this was a reasonable seizure.

THE COURT: Okay. Have I heard everything you're going to say and present on this issue? Or are you going to present any evidence? I don't know where we are.

MR. GOEMANN: Your Honor, I believe that the Commonwealth has the burden of showing that the 4th Amendment does not apply to my client. Which is the grounds that they defended on in their opposition.

If the Court finds that it's my burden, I would ask for a continuance to subpoena an appropriate witness for that. I have not subpoenaed a witness to address that issue. For the arguments I have made earlier, I believe that it's clearly the Commonwealth's issue if they're going to say that the 4th Amendment does not apply to my client for them to show the exception to that.

THE COURT: Well, let hear from the Commonwealth, then, and see where they are. I don't know where anybody is.

MR. HORAN: Your Honor, I thought I was here to respond to the motion that said that because of the 4th

Amendment of the Federal Constitution, that the -- any statements taken from the Defendant should be suppressed. What we're really talking about is whether or not the Court adopted, the United States Supreme Court adopted exclusionary rule applies to a statement taken after a foreign arrest by an American officer.

Your Honor, I think the case law is absolutely clear that the 4th Amendment has no extra-territorial significance. The United States Supreme Court, and the United States versus Verdugo-Urquidez at 494 U.S. at page 259 in 1990 specifically held that the 4th Amendment does not apply outside the territorial confines of the United States.

THE COURT: Well, that was a case in which the United States authorities were not the arresting authority, though, right?

MR. HORAN: No. But the United States authority were the officers who did the search. The 4th Amendment violation was the United States –

THE COURT: Okay.

MR. HORAN: -- violation because the Court found that following his arrest -- what happened in that case you had a Mexican citizen --

THE COURT: Yeah; the DEA --

MR. HORAN: -- who was brought here and the DEA was the -- was the group working with Mexican officials who searched his Mexican residence and the argument, of course, at trial was that the exclusionary rule should apply. And the United States Supreme Court in Verdugo 1992, said no.

THE COURT: Do you say then that it doesn't matter whether he was -- whether he's an American citizen or has substantial contact with the United States or whatever, it's the fact that it was in a foreign country that makes the difference?

MR. HORAN: Yes, Your Honor.

THE COURT: Okay. I understand what you're saying. Go ahead.

MR. HORAN: They're making some ground, if there was allegation here that he was an American citizen who was being searched abroad, but that's not the argument here. The argument here is that the 4th Amendment suppresses the statement he made on the plane during his return to the United States. That's the claim here.

There is no way to read the United States versus Verdugo without coming to the conclusion that the 4th

Amendment doesn't apply in this situation. The United States Supreme Court says at page 267, "the available historical data show therefore that the purpose of the 4th Amendment was to protect the people of the United States against arbitrary action by their own government. It was never suggested that the provision was intended to restrain the actions of the Federal government against aliens outside the United States territory.

There is likewise no indication the 4th Amendment was understood by contemporaries of the framers to apply to activities of the United States directly against aliens --

THE COURT: Well, how do we know he's an alien?

MR. HORAN: -- in foreign territory."

Well, I don't think they make any claim that he isn't an alien.

THE COURT: Well, can --

MR. HORAN: Your Honor, they --

THE COURT: You have this -- you have an any darn fool rule that you invoke every now and then and I don't think that the record will allow that.

I don't know that he is not an American citizen from anything in the record anywhere. How do I know that?

And whose burden is it to show me that he is or isn't.

MR. HORAN: I guess we get back to the thing that you and I have disagreed upon for low these many years. I have always taken the position that at trial I have certain burdens, but pretrial he who alleges must at least go forward with the evidence to prove. Now they have the great benefit under Virginia law that this Defendant can take the witness stand safe from self-incrimination and say I'm a citizen of the United States. I would then have to show that he isn't. But he's not a citizen of the United States. He's never been a citizen of the United States.

It's their burden to bring him within any of the 4th Amendment exceptions. But their claim is a bold claim that the 4th Amendment in this case bars the statement he made through an American officer on the plane.

THE COURT: Okay. Well, let me go back and see if I can get the rule of law that you are asserting. Are you asserting that any person, citizen, alien, otherwise, who is seized by an American law enforcement officer in a foreign country does not have the benefit of the 4th Amendment --

MR. HORAN: Does not.

THE COURT: -- in the way that he was seized.

MR. HORAN: Does not.

THE COURT: Doesn't matter whether it's citizen or not.

MR. HORAN: Unless he's on American territory in some --

THE COURT: No, no. I'm talking -- no, I'm talking about non --

MR. HORAN: If he's seized in foreign territory the 4th Amendment simply has not extra-territorial significance.

THE COURT: Alien citizen or not.

MR. HORAN: Makes no difference. Doesn't apply -- it only applies within our borders.

THE COURT: And do you say that this case I can't pronounce, the Mexico case stands for that proposition.

MR. HORAN: Verdugo. Yes; it does, Your Honor. As a matter of fact, the Supreme Court in Verdugo goes to great pains to point out that the case that Counsel cited, Reid versus Covert, doesn't apply. It doesn't mean anything. Because Reid versus Covert was a 5th and 6th Amendment claim. Not a 4th Amendment claim.

And you'll find at page 270 of the opinion, the Supreme Court said to support his all encompassing view of the 4th Amendment, respondent points to language from the Parali opinion in Reid versus Covert. Reid involved in attempt by Congress to subject the wives of an American servicemen to trial by military tribunals without the protection of the 5th and 6th Amendments.

The Court held it unconstitutional to apply the Uniform Code of Military Justice to trials of American women. Four Justices rejected that the idea that the United States acts against citizens abroad, it can do so free of the Bill of Rights.

That case, Reid, involved the 5th and the 6th Amendment rights, the wives of American servicemen abroad.

It had nothing to do with the 4th Amendment and Verdugo points that out.

Verdugo has to do with the question of a Mexican citizen who is abducted by Mexican officials in Mexico delivered to the American authorities because there's an American warrant out for his arrest and subsequent to that the American officials, through the DEA, go ahead and search his Mexican premises.

So the United States Supreme Court when they got

the case said we are faced here with the question of whether or not there is some extra-territorial dimension to the 4th Amendment to the American Constitution. And Verdugo says no. Whatever it may be with the 5th Amendment and the 6th Amendment is a separate question. Verdugo says the 4th does not apply beyond the borders and that's the situation we're dealing with here.

In this case, we have -- by the stipulation, an American officer arresting this Defendant in a foreign land, bringing him back here.

Now the voluntariness question is the one that I said to Your Honor when I was agreeing to a stipulation, the voluntariness question is a fact specific question. And the evidence should be taken on that.

But here we're with the bold assertion that because of the 4th Amendment of the Federal Constitution, you can't accept any statement made by this Defendant when he's arrested in a foreign land. And I submit, Your Honor, under Verdugo, the 4th just doesn't apply. And any questions about voluntariness, that's for another witness and a different fact --

THE COURT: Well, I think everybody agrees with that. Okay. Response?

MR. GOEMANN: Your Honor, as Mr. Horan clearly read Verdugo-Urquidez far too broadly. The whole discussion in that case is regarding the status of the person who was involved. The Court deals very quickly with the fact that it had occurred in Mexico, and there's no doubt that the dimension of a 4th Amendment protections are different outside of the United States. But those dimensions change based on the status of the person who was involved.

So the first question is does the 4th Amendment apply in a foreign country; generally, no. But when the FBI goes out and does something like this, seizes somebody, it does apply.

The next question is does it apply to this particular person. And Verdugo-Urquidez very clearly talks about the distinction among people of different statuses. And they talk about people having voluntarily and presumably accepted societal -- voluntarily come to the country and accepted societal obligations. It talks about what is the status of the person that we are looking at. So there are two inquires.

And I think Mr. Horan would like to read Verdugo-Urquidez to completely wipe out the second one,

which basically means that a citizen of the United States who goes abroad and is arrested by the United States law enforcement officers and brought back to the United States can not claim a 4th Amendment violation.

The whole discussion of Verdugo is what does the people mean. And the people means citizens or people who have this substantial connection with the United States. That's their whole focus in Verdugo. What does this word, this phrase mean.

And surely if a person, a citizen of the United States leaves this country, they have not forfeited their peoplehood, they have not forfeited the protections of being part of the people of the United States. So the status of the person is crucial.

And again, Your Honor, I submit that it is the Commonwealth that has the burden to prove that status when they are asking that someone that they seized not receive the protections of the Constitution.

THE COURT: I find two things. First, I find that the status of the person is the issue in Verdugo, or however you say that word. And I find further the burden is on the Defendant to show that.

The issue that we need to address is was this

Defendant one of the people. He is asking that protection of the 4th Amendment be applied to him. He has to make a prima facia case to show that he is entitled to claim that protection and at least a prima facia case that it was violated.

Now I think once he makes that prima facia case then I, in disagreement with Mr. Horan, I guess, think the burden is on the Commonwealth to prove the facts with regard to that event.

But to bring himself within -- the Commonwealth isn't asking that anything that he be deprived of any right. He's asking that certain things be done because he's entitled to the right. And he has to show a prima facia case that he's entitled to it. In most cases, there isn't any question. Nobody, you know, everybody -- it's one of those everybody knows things.

But here, the only thing I know from the -- anything in the case about Mr. Kansi's connection with the United States is that on one day he is accused of being here. I know knowing else about it, and I think the burden is on you to show it.

If you want to rely on that and just say, you know, stop there, I guess you can and you can appeal on

that point and we'll see. If you want to go forward and present evidence that he is one of the people, I'll hear the evidence. But if you're going to rely on where you are, then I say you have not made a burden that requires the Commonwealth to go forward and he's not entitled to the protection of the 4th Amendment because you haven't made the case that he is.

So I guess you've got a choice. You can either rest there and live to fight another day or you can present the evidence and live to fight another day.

MR. GOEMANN: As much as I'd like to rest, Your Honor, right now, I will not. Let me note my exception to the Court's ruling.

THE COURT: You may certainly note your exception.

MR. GOEMANN: And I would ask, then, for a brief continuance to subpoena a witness that I believe will be able to meet the Court's burden that is placed on the Defendant.

THE COURT: Okay. What does that do to any evidence that you may have brought to -- do you have any objection, I guess? How about the 22nd. We've got the 22nd. Is that enough time?

MR. GOEMANN: If I can -- if I can get a subpoena issued today, Your Honor, I might be able to get it served tomorrow for the 22nd.

THE COURT: What's your position?

MR. HORAN: Well, Judge, the problem is that we've come in here prepared to respond to the allegations. They have made no claim either a, that he's an American citizen or that he occupies some peculiar status which makes the 4th Amendment apply to --

THE COURT: Well, they didn't do that because they erroneously thought that was your burden. I now have said it's not your burden. It's theirs.

I guess if you want to present your evidence and have me wait and see, you can do that, if you want to. If you have a problem getting your witnesses back here on the 22nd.

It's your burden to show the facts of the event if, in fact, he comes within the purview of the -- of the 4th Amendment which I don't know at this point.

MR. HORAN: They will have to get someone to perjure himself or herself to prove that he's an American citizen because he's not.

THE COURT: Well, I think -- well, I won't say

that. The issue is not is he an American citizen, the issue is he one of the people in the 4th Amendment.

So are we going to continue to the 22nd? Do you need another date?

MR. GOEMANN: Your Honor, well, the 27th. We have that date. I don't want to take any chances of having to come up and bring the witnesses again --

THE COURT: Yeah, I guess, okay.

MR. GOEMANN: -- and us being unable to subpoena a witness.

THE COURT: I guess we can do it on the 27th. We'll be busy little beavers on the 27th, I guess.

What are we continuing to the 27th? Again, I know that these motions overlap to some extent and I'm trying to keep straight what motion I'm hearing.

I have in my hand, here, the motion to suppress evidence that begin in the way that I said that sometime the beginning of June the Defendant, Mir Aimal Kansi, was abducted from Pakistan. Is that the motion we're continuing to the 27th?

MR. GOEMANN: Yes, Your Honor.

THE COURT: Are there any others yet? Or is that it as far as --

APPENDIX Y

FILED
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RICHMOND, VIRGINIA

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF VIRGINIA,	:	
vs.	:	CRIMINAL NUMBER
MIR AIMAL KASI,	:	79148
a/k/a MIR AIMAL KANSI	:	
Defendant.	:	

----------x

Courtroom no. 5G
Fairfax County Judicial Center
Fairfax, Virginia
Monday, October 27, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:02 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth's Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

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CONTENTS

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
WILLIAM WHILDEN	28	46	57	65
ZAHID MIR	93	94	--	--
KHAN ASGHAR	96	99	--	--
NASIR ESHEI	103	108	--	--
JEFF FREDERICK	113	118	--	--
THOMAS CAMPBELL	124	137	--	--
DAVID CLARK	171	178	--	--

* * * * * * * * * * * * * *

EXHIBITS

	MARKED FOR IDENTIFICATION	RECEIVED IN EVIDENCE
DEFENSE EXHIBIT NOS. 1-3 (Affidavits)	72	72
DEFENSE EXHIBIT NO. 4 (Employment documents)	115	115
COMMONWEALTH EXHIBIT NO. 1 (Immigration document)	128	130

DEFENSE EXHIBIT NO. 5 (Response to FOIA Request)	145	
DEFENSE EXHIBIT NO. 7 (Newspaper articles)	194	194
DEFENSE EXHIBIT NO. 1A-F (Video tapes of news reports)	198	198
DEFENSE EXHIBIT NO. 8 (Response to subpoena)	199	199

* * * * * * * * * * * * *

similar fashion, but I would ask that he be recognized to return after the break.

THE COURT: Okay; if you would please remain, Mr. Synder.

(Recess)

THE COURT: Which one are we going to do next, so I know -- if I can get it.

MR. ROMANO: The motion that was continued from last week to suppress, based on the unreasonable seizure.

(Whereupon, the Defendant entered the courtroom.)

THE COURT: Okay.

MR. GOEMANN: Your Honor, as I had mentioned before the break, we have a similar issue regarding Mr. Mir being called as a witness. I think it can be dealt with at the bench in a similar fashion. I'd ask to approach the bench concerning that.

THE COURT: Okay.

BENCH CONFERENCE

MR. GOEMANN: Your Honor, the purpose of my calling Mr. Mir would be to establish that my client was a roommate of his for approximately two months at the end of

1992 and '93. I don't know exactly what the parameters are that Mr. Mir would testify to because he hasn't been willing to speak with the defense investigator.

But, I -- as part of my burden, as the Court ruled last week, I do have to establish a connection between my client and the United States and part of that proof would be his having been a roommate in a particular location in Virginia. And that's what I would be calling him for.

I don't know if he would say -- my belief is that he would say that he was living there for at least two months at the end of 1992 and the beginning of 1993.

THE COURT: What are you asking me to –

MR. SNYDER: I think out of deference to our concerns, Your Honor, if we could do it right here at the bench, I don't think my client would have any objection to answering a question of that nature.

THE COURT: Well, do you know the answer to the question?

MR. HORAN: Not specifically. I know he was there for a period of time.

THE COURT: Okay. Well, do you have any objection to him testifying from right here?

MR. HORAN: No.

THE COURT: Okay; and is that agreeable with you?

MR. GOEMANN: That would be fine, Your Honor, yes.

Whereupon,

ZAHID MIR,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Would you state -- tell the Court Reporter your name?

A My name is Zahid Kawaga.

Q And in 1993, did you also go by the name Zahid Mir?

A Yes.

Q And at some time during 1992, did you begin living with my client, Mir Aimal Kansi?

A Yes.

Q Do you remember approximately when that was?

A August -- August to January.

Q August of 1992?
A Yes.
Q Until January of 1993?
A Yeah.
Q And during that time period he was your roommate?
A Yes.
Q And where were you living during that time?
A In Laurel Glade.
Q Where is that located?
A Reston -- in Reston, I believe, in the apartment in Reston.
Q Was the apartment in Virginia?
A Yeah; in Virginia, Reston.
Q In the United States?
A Yes.

MR. GOEMANN: Thank you, that's all I would have.

THE COURT: Any questions you want to ask?

CROSS EXAMINATION

BY MR. HORAN:

Q That apartment is your apartment?
A Yes; in my name.

Q You leased it in your name alone?
A Yes.
Q And did he pay you some form of rent?
A Yes.
Q And for how long do you think that existed?
A Like, five months he lived.
Q Okay; and finally he left in January of '93?
A Yeah.
Q And he's never been back?
A Yes.

THE COURT: Okay.

MR. GOEMANN: I have nothing else.

MR. SNYDER: May we be excused, Your Honor?

MR. GOEMANN: I have no objection.

MR. HORAN: No objection.

THE COURT: Okay; you're free to go.

MR. SNYDER: Thank you.

(The witness was excused.)

OPEN COURT

MR. GOEMANN: Your Honor, my next witness is Asghar Khan.

Whereupon,

KHAN ASGHAR,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Mr. Khan, if you'd please tell the Court your name and spell it, both your first and last?

A Sure, my name is Khan Asghar, spelled K-H-A-N, A-S-G-H-A-R.

Q Which is you first name and which is your last name?

A It's -- Khan is the first name, Asghar is last name.

Q I apologize for messing that up.

A That's all right.

Q Mr. Asghar, do you know my client, Mir Aimal Kasi?

A Yes; I do.

Q Okay; and when did you first meet him?

A It was early part of 1991.

Q And what were you doing? Were you employed at

that time?

A I -- I had my own business.

Q What was that business?

A It was a moving and rental business.

Q Where was that located?

A In Chantilly.

Q That's in Virginia?

A That's in Virginia.

Q In the United States?

A That's correct.

Q What was the name of your business?

A It's Ace Movers and Rentals.

Q I'm sorry, Ace Movers and what?

A Rentals.

Q And rentals. You said you were the owner?

A Yeah.

Q How did you come to meet Mr. Kasi?

A There was Khan, a friend of mine, who I knew since last twenty years or so and he brought Aimal Kasi over to our office out there.

Q All right; and after you met him, Mr. Kasi, did he do any work at all for Ace Movers and Rentals?

A It was not work per se because I was starting

off on that business. I do all rentals and was getting into the moving business. He was -- he -- at that time did not have anyplace to live, so he was afforded a place at the office on the top floor to reside temporarily. And in which course, while he was there, he did help me out a few times.

Q All right; you say he was living above the office?

A That's correct.

Q And where was that -- what was the address of that apartment?

A It's way -- it's Route -- Route 1, Box 277. That should be it.

Q That would be the mailing address for it?

A No; that's the actual address. It's on Route 50, but they call it, I mean, the address was such, it's Route 1, Box 277.

Q All right; that was also in Chantilly?

A Yeah; that's the place where I was working from.

Q Right.

A And that's where he lived too.

Q And approximately how long did he live there?

A I would say two months or thereabouts.
Q And you said that while he was living there he also did sort of some odd jobs for you, is that fair?
A That's correct. We did need moving help off and on and so, we were getting started, he pitched in whenever we asked him to.
Q Do you remember approximately when in 1991 this was, you said early, we're talking winter time or something later than that?
A It was -- I started the business in January so it should be between February and March, April, summer -- summer time.

MR. GOEMANN: That's all I have for the witness, Your Honor.

THE COURT: Cross examination? He may have some questions for you.

CROSS EXAMINATION

BY MR. HORAN:

Q Mr. Asghar, when did he start living above the office?
A Like I said, sir, it's early part of -- I think it was February. I'm just going by approximately, it's like --

Q Approximately?
A Yeah.
Q Early part of February of 1992?
A It would be 1991.
Q February of '91 and he lived above the office until --
A Just a couple of months.
Q And during that period of time he worked odd jobs for you?
A Yeah; whenever we asked him to. He was not employed as such. I mean, he was living up there and he would just, I believe at that time, entered the country so he didn't know anybody else other than Master Chang [ph] and so.
Q And he was not a citizen of the United States at that time?
MR. GOEMANN: Objection, Your Honor. First of all, it's beyond the expertise of this witness. He's incompetent to testify to his status and it would be hearsay.
THE COURT: I sustain the objection unless you can lay a foundation for some knowledge.

BY MR. HORAN:

Q Did you ever discuss with him his legal status in the United States?

A Not really, no.

Q Well, is there some reason -- when he worked for you, did you pay him?

A No; like I said, he just came in to -- like he was helping out because he was living up there and that's -- that's the only –

Q Where did he go when he left you?

MR. GOEMANN: Objection, lack of foundation.

BY MR. HORAN:

Q Do you know? Where did he move when he left you?

THE COURT: I sustain the objection. You have to lay a foundation for the basis of any knowledge that he has of that subject.

BY MR. HORAN:

Q He left you in the summer of 1992?

A Like spring or summer of -- I -- like I said, I don't recollect the exact time frame but like two months later when he moved in then he moved out. And he moved into the vicinity. I don't even know the -- where the

exact address was or anything, that's all. But he did find someplace in Reston, I think that's where he went.

Q So, in the summer of 1992, he would have found someplace in Reston?

A That's --

MR. GOEMANN: Your Honor, I object. He's testified several times that it was 1991.

THE COURT: I sustain the objection.

BY MR. HORAN:

Q So when would it be your recollection that he went to someplace in Reston?

A As soon as he left my premises, that would be like spring 1991.

Q Did he ever work for you after the spring of 1991?

A Not really, no.

Q Did you ever fill out any W-2 forms or anything like that for him?

A No; like I said, he was not employed or he did not work on regular basis. The only time he did work was when he was up there and when we were running short on any help, we asked him if he did pitch in to help.

MR. HORAN: I have no further questions, Your

Honor.

THE COURT: Anything on the re-direct?

MR. GOEMANN: No, Your Honor.

THE COURT: May he be excused?

MR. GOEMANN: Yes, Your Honor.

THE COURT: You're excused and free to go or stay as you wish. Thank you.

THE WITNESS: Thank you very much.

(The witness was excused.)

THE COURT: Next?

MR. GOEMANN: The next witness is Nasir Eshei.

Whereupon,

NASIR ESHEI,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Sir, please tell the Court your name and spell your first and last name for the Court Reporter?

A Nasir Eshei, N-A-S-I-R, E-S-H-E-I. Eshei is last name.

Q Mr. Eshei -- Eshei, do you know our client,

Mir Aimal Kasi?

A Yes; I do.

Q And how long have you known him?

A When he came in most probably in '91 sometime, around that period and he was living with his -- my common friend and when I introduced to him.

Q Your common friend, is that Mr. Asghar?

A No; -- Sarfrazi.

Q Excuse me?

A Sarfrazi.

Q Do you know how that's spelled?

A S-A-R-F-R-A-Z-I, I think, sir.

Q All right; so he was living with Mr. Sarfrazi for a time and that's when you met him?

A Yes.

Q And at some point after meeting him, did you and he discuss a business venture together?

A Not -- not then, later on.

Q Well, what was -- did you start a business?

A Yeah; I had a moving company too, at that time.

Q What was it called?

A Budget Moving.

Q And where was Budget Moving located?

A Same address where the Ace Movers were. I use the same address and my home address, both.

Q All right; and were they both in Virginia?

A Both in Virginia.

Q In the United States?

A That's correct.

Q At what point did you and Mr. Kasi discuss a business venture together?

A Actually, I was in the business already but I was renting trucks not owning truck. I nothing on my own. I renting it from Ace Rental U-Haul and when I would need it, I used to use it and then I return it back. So, that's how I was doing it. And then when I met him, he says, if you can buy another truck and then rather paying all the rent, you can pay me instead of that. And that's how we got together.

Q What exactly was the nature of the transaction that occurred as a result of that conversation?

A Basically was -- he was just looking for some income, coming up in that business which can help him out at that time.

Q And what did he do to help you?

A Yeah; he was -- sometime he was with mover, sometime he wasn't but he had more intention of like getting into the business but he wants to know about -- at that time he doesn't know how to get the different like --

Q Did he help you purchase a truck for the business?

A Yeah; he did.

Q Okay; and how did he do that?

A He paid cash money to -- for that.

Q How much did he give you?

A Five thousand dollars.

Q And with that, did you purchase a truck for budget movers?

A No; actually we purchased the truck like on our own name.

Q All right.

A On the company name.

Q What was it to be used for?

A For the same moving -- for moving purpose; yeah.

Q Do you remember approximately when this was that you purchased the truck?

A Most probably mid '91 sometime.

Q May of '91?
A No; mid -- mid '91.
Q Mid 1991.
A Same period when he was moved on to -- to the address in Chantilly.
Q You're saying it's around the time he moved out?
A No; moved in over there. At the same time I purchase the truck.
Q And then once you had purchased the truck together, you said that he wanted to learn -- learn about the business, is that right?
A Learn about the business, how to read a map, how to get to one end to another, because these all new different places, so, you -- you only done with the time. You can't be coming any -- until you -- how to go -- get to point A to point B or you get in one state to another, where to sign --
Q And did he help out with the moving jobs?
A Yes; sometimes.
Q How long was it that he was helping with the moving jobs?
A I didn't get that.

Q About how long did that continue, him helping you?

A Almost for like about a year or so.

Q About a year. And during that entire year, the business was located in Virginia, is that correct?

A Yeah; oh yeah, yeah.

Q In the United States?

A Right -- right, in Virginia.

MR. GOEMANN: I have nothing else, Your Honor.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. HORAN:

Q I understand you to say you had some sort of agreement with him as of --

A It's a verbal agreement, it's nothing that's written.

Q Pardon?

A It's a verbal agreement, nothing like agreement, like --

Q No written agreement?

A No; not written anything.

Q He agreed to give you five thousand so you --

A Yeah; something like that.

Q Something like that?

A Yes; he give me five thousand dollars to go get the truck, so we put the -- the money in -- in account and then he paid the check to the company he bought the truck from.

Q What did he get as a result of the agreement?

A When he do a job, the rental I supposed to pay for renting a truck, give it to him.

Q And did you get anything out of the rental of a truck?

A Of course, I'm going to use it, I can get the money what I'm going to do the job for. So, I get that money and the rental money cost. If he works with me, then he can get that part too. If not, then just get the rental money.

Q Was he an employee of Budget Moving?

A No; he wasn't employee, no.

Q Did he have a work permit?

A I --

MR. GOEMANN: Objection, lack of foundation.

THE COURT: I overrule the objection.

MR. HORAN: If he knows. He's a businessman.

BY MR. HORAN:

Q Did he have a work permit?

A As long I know, he came on a business Visa to America. That's what I know and my knowledge.

Q He had what kind of a Visa?

A Business Visa.

Q A business Visa?

A Yeah; that's -- in my knowledge. I never seen any paper, anything like that, but that was my knowledge.

Q Well, you knew he was not a citizen?

MR. GOEMANN: Objection.

MR. HORAN: This is cross examination, Your Honor.

MR. GOEMANN: Lack of foundation.

THE COURT: I sustain the objection for -- and you'll have to lay the basis of a foundation of how he would know that.

BY MR. HORAN:

Q Do you ever inquire of him of whether or not he was a citizen?

A He wasn't a citizen, I know that much. I don't have to inquire about it.

Q Okay; as far as you knew, he was just here on

a business Visa?

A That much I know; yeah.

Q And he never became an employee of Budget?

A No; he never become an employee of Budget, no.

Q What happened to the truck when he left Budget?

A Later on I sold it.

Q The company sold it or he sold it?

A I sold it -- I sold it because at that time I was in the courier business and the truck was giving me a little troubles and for this it was parking problem other things for which I have to sold it. It was breaking down.

Q Now once you bought the truck, the truck was in Budget's name?

A No; it was in my name.

Q Your name. Well, when you sold the truck, who got the money for it?

A I had the money.

Q During the year that he worked with you, where was he living?

A Where he was living when he was working and I was -- I was know him; first he was living down in Chantilly, the address we -- I told you the Texaco Gas,

next to another property where he was living on top of it -- over the office. And later on he moved to some other Pakistani guy's house. I don't know where he lived and I never visited there. So, I'm not exactly know where was that place was.

Q Well, as of the summer of 1992, he no longer worked with you?

A On and off, if I would maybe need any help and all that. He may be there but I can't exactly recall if he was exactly working with me, but at that time most probably he was working some other jobs.

Q But at the time he left you and didn't stay with Budget, did he still have the business Visa as far as you know?

A No; I -- I -- I don't know that.

MR. HORAN: I have nothing further.

THE COURT: Anything on redirect?

MR. GOEMANN: No; Your Honor.

THE COURT: May he be excused?

MR. GOEMANN: Yes; Your Honor.

THE COURT: You're excused and free to go or stay as you wish, thank you.

(The witness was excused.)

MR. GOEMANN: I call Jeff Frederick, Your Honor.

Whereupon,

JEFF FREDERICK,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Mr. Frederick, could you please tell the Court your name and where you're employed?

A My name is Jeffrey G. Frederick, I'm employed with Excel Courier in Sterling, Virginia.

Q How long have you been employed there?

A About nine years.

Q What's your current position?

A Vice President.

Q You were employed there then back in 1993, is that correct?

A That's correct.

Q What was your position in January of 1993?

A Vice President.

Q And while you were vice president in 1993, did

you get to know our client, Mr. Kasi?

A Yes.

Q And how did you first come to know him?

A He was a driver for us.

Q Could you explain to the Court the arrangement that Excel has with its drivers?

A Our courier drivers are independent contractors. They own their own businesses and we contract them to do work for us.

Q Do you remember approximately when it was that you first -- that Mr. Kasi first became associated with Excel?

A I know I turned in a bunch of records that have all those dates on it. It was approximately August of '92.

Q You turned that in to the Court?

A Yes.

MR. GOEMANN: Your Honor, may I approach?

THE COURT: Yes.

THE WITNESS: I was subpoenaed to turn those in.

MR. GOEMANN: All right; I'll have these marked as Defense exhibit. That's exhibit number four for

identification.

(The document referred to below was marked for identification as Defense Exhibit No. 4.)

MR. GOEMANN: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. GOEMANN:

Q Sir, I'm showing you what's been marked as Defense exhibit four for identification.

(Mr. Goemann handed a document to the witness for his examination.)

Could you look through that packet. What is that?

A This is information out of Mir's file and also some information from my computer database that I printed out the other day so that I could answer the questions that you all were asking me.

Q You indicated a moment ago that you didn't recall exactly when Mr. Kasi became associated with Excel. Would referring to those documents refresh your memory?

A Yes; definitely.

Q Okay; could you look through the documents and

then look up when you're done.

(The witness complied with the request.)

A It was the last week in August of '92 is when he started.

Q And what's the process that Excel goes through to enter into a contract with a driver?

A We give them a test. Test their map reading skills, speak to them about how much time they'll be able to give us, go over that they have to drive their own vehicle, go over the fact that they know that it's their own business that they're -- they're getting into. They sign a contract with us and they go out and they run jobs for us and they make a commission off the jobs they run.

Q Is there a certain insurance requirements necessary to be a driver?

A Yes.

Q And what were those insurance requirements in 1993?

A It would be in the contract. It's minimum coverage of a hundred thousand dollars, three hundred thousand dollars of personal liability and a hundred thousand dollars for property damage.

Q And did Mr. Kasi have appropriate insurance to

enter into the contract?

A I believe that is the case; yes.

Q Do you have documentation there indicating he was insured?

A Yes; I do.

Q Is it also required that a driver obtain a driver's license?

A Yes.

Q And would you have entered into a contract with a driver who did not have a valid driver's license?

A Definitely not.

Q Did you enter into a contract with Mr. Kasi?

A Yes; we did and he gave us a copy of his Virginia Driver's License, also a copy of DMV motor vehicles record stating that he had no points on his license.

Q And was -- was a contract between Mr. Kasi and Excel Couriers in effect from the end of August 1992 until January of 1993?

A That's correct.

MR. GOEMANN: I have nothing else, Your Honor.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. HORAN:

Q Mr. Frederick, as I understand it, in August of '92 your company Excel contracted with him as an independent contractor?

A Yes, sir.

Q He was not an employee of your corporation?

A (Shaking head.)

Q Did you withhold any taxes for monies to be paid to him?

A No, sir.

Q Fill out any W-2 forms or anything like that?

A Our contractors get 1099 forms.

Q I notice that there is no work permit for him in the files you provided. Did you make any determination whether or not he had a work permit?

A No, sir.

Q Did you believe him to be a United States citizen?

MR. GOEMANN: Objection relevance, lack of foundation.

MR. HORAN: Your Honor, one of the requirements of the law --

THE COURT: I overrule the objection.

THE WITNESS: If someone gives us a social security number that would -- at that point in time, that would be as far as we would go. We would not go further into checking things out.

BY MR. HORAN:

Q So you never checked his status insofar as immigration was concerned?

A No.

Q He worked for you varying numbers of days each month?

A Yes.

Q Was there no real fixed schedule?

A That's correct, that's -- that's --

Q You would just call him and see if he was available to make a pick up?

A Or he would call us and say, I'm ready to go and -- it's an independent contractor's right to work or not work on a particular day.

Q And then over those months you -- you would bill certain money and then deduct from that certain things and come up ultimately with a check that was to go to him?

A Correct.

Q And I notice on your forms, a lot of the time you would have a -- a deduction of twenty dollars for radio?

A That is correct. We would lease a radio to our independent contracts for the fee of twenty dollars a week.

Q So on all your bills would show on those week ending so and so, the twenty dollars would be for his lease of the radio by which you contacted him and he contacted you?

A Correct.

MR. GOEMANN: Your Honor, I would object to -- if Mr. Horan is referring to the exhibit, I'd ask that he refer to it. If he's referring to some other document that's not before the witness, I'd ask that, if the witness is going to be questioned about it he be showed the document.

THE COURT: Well, I haven't heard the witness have a problem answering a question. And I'm not sure what your objection is.

MR. GOEMANN: Well, Your Honor, Mr. Horan --

MR. HORAN: It's in that stack of documents

they got here. They're the only documents I have.

THE COURT: I overrule the objection. If he -- he can ask him a question from the phonebook if he wants to. If he can't answer it, I guess, see where we go.

BY MR. HORAN:

Q So the twenty dollars would be for that lease purposes?

A That is correct.

Q And sometimes there'd be things in there, six dollars, four dollars, three dollars, miscellaneous. What would that be?

A Occasionally drivers would pick up cash from clients. We would let them keep the cash and we would deduct if from their check. Occasionally there's a five dollar pages. We had an agreement with our contractors that we charge them five dollars a month to have a pager and I can't think of anything else that would be on this one but if we look through it --

Q Would your records show what was the last day he worked with you?

A It was the 23rd of January 1993.

Q And have you ever seen him or talked to him

since the 23rd of January, 1993?

A No; I haven't.

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Any further questions.

MR. GOEMANN: No; Your Honor.

THE COURT: May he be excused?

MR. GOEMANN: Yes; Your Honor.

THE COURT: Okay; you're excused and free to go or stay as you wish, thank you.

(The witness was excused.)

MR. GOEMANN: Your Honor, last week the Court ruled over Defense objection that we had the burden of going forward to show that our client had a connection to the United States for the purposes of our motion. The Court indicated that we would need to present prima facia evidence of that and then once that was done, the burden would shift to the Commonwealth.

The evidence that we have provided, we believe, shows that Mr. Kasi had a -- a substantial connection to the United States. The evidence clearly shows that he was here in 1991, he lived here, worked here and invested in business here, independently contracted

with a business and had a driver's license.

THE COURT: I'm not sure what you're doing now.

MR. GOEMANN: Well, Your Honor, I'm simply arguing that we've made out our prima facia case, that he had a substantial connection.

THE COURT: Well, if you think you have, then I'll see if they have any evidence and if they don't, then we'll see where we go with the argument.

MR. GOEMANN: Very well, Your Honor.

THE COURT: If you're stopping then it's --

MR. GOEMANN: I rest on that evidence, Your Honor.

THE COURT: Okay; do you have any evidence you want to present, Mr. Horan?

MR. HORAN: Yes, Your Honor, I'd call Mr. Campbell.

Whereupon,

THOMAS CAMPBELL,

a witness, was called for examination by counsel on behalf of the Commonwealth, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name, please?

A My name is Thomas Campbell, sir.

Q And by whom are you employed?

A I'm a special agent with the immigration service.

Q Are you the custodian of the immigration records of Mir Aimal Kasi?

A Yes, sir; I am.

Q And how do you become the custodian of those records?

A I've been designated by the district director, who is the ultimate custodian, to be the custodian of the records that pertain to Mr. Kasi.

Q Could you tell us whether or not he's a citizen of the United States?

MR. GOEMANN: Objection, Your Honor. If he's

a custodian he might have some records that are relevant to this proceeding but he doesn't have any independent knowledge that --

THE COURT: I sustain the objection. It would have to be on the basis of --

MR. HORAN: Do you have --

THE COURT: Unless he has some independent knowledge.

BY MR. HORAN:

Q Do you have records of -- that show how he entered the United States?

A Yes, sir; I do.

Q And do you have those records with you?

A Yes, sir; I do.

Q Would you get them, please?

(The witness complied with the request.)

Could you show us the document that -- and are those the immigration service records that you have in front of you?

A Yes, sir; these are two copies of the immigration records that I have on Mr. Kasi.

Q And could you show us the document in immigration that indicates his last entry in the United

States?

A I have essentially three documents within two files for Mr. Kasi. I have what is a --

MR. GOEMANN: Your Honor, I would object. There's been authentication of these documents.

THE COURT: I overrule the objection, this is the custodian of the records.

THE WITNESS: I have what is -- what we refer to as a non-immigrant information system inquiry check diagram for Mr. Kasi that indicates he entered the United States as a -- on a tourist or a business Visa in 1991 through New York City.

In addition, I have two other documents that are affidavits submitted on Mr. Kansi or Kasi's behalf that indicate that he illegally entered the United States --

MR. GOEMANN: Objection, Your Honor. Those documents -- there needs to be an adequate foundation of those documents and where they came from and how they're authenticated.

THE COURT: All right; I sustain the objection.

BY MR. HORAN:

Q I'll rephrase the question. What was the date he entered the United States under the tourist or business Visa?

A I have a Mr. Mir Aimal Kansi -- Kasi, excuse me, entering the United States of 2/27/1991, as a -- on a tourist or business Visa and he was authorized to stay in the United States to March 30th, 1991.

This Visa, a non-immigrant Visa, was issued in Karachi on December 4th, 1990.

Q That Visa expired when?

A His admission period expired in March 1991.

MR. GOEMANN: Your Honor, I'm going to object now because if you're going to continue to refer to these records, I would at least like to have the opportunity to see them. Counsel has not seen these records at all.

MR. HORAN: Well, I wonder, would you give us the record that shows what his entry was?

THE COURT: Okay; you can come up and look at it.

BY MR. HORAN:

Q Is that a certified copy of it?

A No, sir; I did not have these certified.

Q But you have looked at the original record and that is a copy of the original record?

A That is correct; yes, sir.

MR. HORAN: Your Honor, I'd ask this be marked as Commonwealth's exhibit number 1 for purposes of this hearing.

(The document referred to above was marked for identification as Commonwealth's Exhibit No. 1.)

BY MR. HORAN:

Q I'm going to show you that document that's now been marked Commonwealth's exhibit number one for identification and ask, can you tell us what that document is?

A This is a computer printout of our -- the immigration services non-immigrant information system. This reflects people that are not citizens or nationals of the United States, entering the United States as a non-immigrant.

In this particular case, this is for --

MR. GOEMANN: Objection, Your Honor. I believe this needs to be shown to be a business record or some other exception to the hearsay rule before he

testifies to its contents.

THE COURT: It has. He is the custodian of the record and I overrule the objection.

MR. GOEMANN: Well, Your Honor, if I may, there's a lot more to the hearsay exception of a business record than simply the custodian being present and saying I'm the custodian and I would object on that basis and if that has not been sufficiently shown, the hearsay exception, I would also object that an exception to the confrontation clause of the Constitution hasn't been proven and therefore this would be a confrontation clause violation.

THE COURT: Your objection is noted.

BY MR. HORAN:

Q Go ahead.

A This reflects a Mir Aimal Kasi entering the United States on 2/27 of 1991. It says that he's a country -- citizenship is Pakistan, the class of admission in this particular case is a B1, which is a tourist or a business Visa to enter the United States through New York City. That he obtained his Visa in Karachi, Pakistan on December 4th, 1990, and gave an address of his intention to go to the United States of hotel Quality Inn, New York.

MR. HORAN: Your Honor, I would offer that into evidence, Commonwealth's exhibit number one.

THE COURT: Any objection other than what you've stated?

MR. GOEMANN: Not other than what I've stated.

THE COURT: Okay; the objection is overruled and the document is received.

(The document previously marked for identification as Commonwealth's Exhibit No. 1 was received in evidence.)

BY MR. HORAN:

Q Now the particular Visa under which he entered, how long under immigration regulations is that Visa good for?

A The Visa itself can be good for a five year period but you are allowed to enter the United States for a specific period of time within that five periods. The longest period of time with this particular Visa would have been a year. In this particular case Mr. Kansi or Kasi was admitted into the United States until, I believe, March 30th, 1991, about a thirty day period.

Q Now, do the records reflect any other entry in

the United States by Mr. Kasi other than that entry?

A Yes, sir; I have two other files for Mr. Kansi or Kasi, as we know him now. One is a file for political asylum. Within this file Mr. Kasi presides -- provides a Pakistani passport that was issued for --

MR. GOEMANN: Your Honor, I make the same objection that these are not properly authenticated. They don't come within any hearsay exception and if he's going to start testifying about things that come from other countries, I don't believe he has laid it out -- there's been an adequate foundation laid that he can properly authenticate those documents.

THE COURT: I overrule the objection but if you want to look at the documents you may.

MR. GOEMANN: I certainly do.

(The witness handed a document to Mr. Goemann for his examination and conferred with him.)

THE COURT: Would you testify for the record what you're telling him?

THE WITNESS: Oh, I'm sorry, sir.

THE COURT: I don't know what you're saying.

THE WITNESS: I was basically explaining these records for him so he'd have some sort of idea what he's

looking at.

THE COURT: Well, explain it.

THE WITNESS: Certainly, within this file there are some computer screen printouts that reflect Mr. Kansi's application status for political asylum. He --

MR. GOEMANN: Your Honor, in fairness, I would like to have the opportunity to view the documents without his testifying --

THE COURT: Okay; you don't want his -- his information?

MR. GOEMANN: Not at this point, Your Honor.

THE COURT: All right; then just let him look at the documents and don't say anything about them.

(Pause.)

MR. GOEMANN: So this is also an amnesty file that pertains to Mr. Kasi.

MR. HORAN: Let's just stick with this file for a moment.

THE COURT: And your question, Mr. Horan?

BY MR. HORAN:

Q Mr. Campbell, do those records reflect any re-entry into the United States by this, Mr. Kasi, any time after the entry in 1991?

A In this asylum file; no, sir. Mr. Kasi has re-entered the United States, and he's permanently been paroled by the immigration service.

Q As of January of 1993, had he come back in the United States at all from the original entry of January of '91 until January of '93?

A Not to my knowledge, sir.

Q Well, would your records reflect that if he had re-entered the United States at any time from January of '91 until January 25 of 1993?

A Yes, sir.

Q And you don't find any entry?

A No, sir.

Q Can you tell from examining those records what his legal status was in the United States as of January 25th of 1993?

MR. GOEMANN: Your Honor, I'd object. I don't know that this witness -- I object that this witness does not have the -- there's no foundation laid for that question. That's a legal determination. There's no foundation for this witness having a legal expertise or the knowledge to make that legal determination.

THE COURT: I sustain the objection of asking

him what he can determine. If the records have a reflection, he may testify what the records show.

BY MR. HORAN:

Q Did he apply for United States citizenship anytime prior to January 25, 1993?

A No, sir; he would have been ineligible to apply. He -- he had no lawful status in the United States.

MR. GOEMANN: Objection, Your Honor. It's non-responsive and he's not testifying about what the records -- he seems to be testifying about his opinion.

THE COURT: I sustain the objection.

MR. HORAN: Your Honor, if it's not in there, if the records -- an application for citizenship would be in the records and there is not in the records. You are -- you are forced to prove a negative. It's not there. If he had applied, it would be there.

THE COURT: Well, I understand and the fact that it isn't there, he has said, it's all the other stuff he added on there that I'm sustaining the objection to.

MR. HORAN: Well, as long as Your Honor heard him say it wasn't there, I have no further questions.

THE COURT: I sustain the objection to the

additions to the -- there is no application for a citizenship there.

MR. GOEMANN: Your Honor, I would ask for brief adjournment at this time. As the Court knows, we made a four year request to the INS quite a long time ago and were told that the original file could not be found by them in response to our request.

I would like to go get the documents for possible use in cross examination of this witness concerning these documents.

THE COURT: You'd like to go get what documents?

MR. GOEMANN: The documents that we received from the INS indicating that they couldn't find the file. A file which apparently has now reappeared.

THE COURT: And you have something in your office or something?

MR. GOEMANN: Yes, Your Honor.

THE COURT: We'll break until two o'clock, break for lunch. We have to break in a few minutes anyway.

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136

(Whereupon, at approximately 12:49 o'clock p.m., the hearing in the above-entitled matter was recessed, to reconvene at approximately 2:00 o'clock p.m.)

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AFTERNOON SESSION

(The hearing in the above-entitled matter was reconvened at approximately 2:00 o'clock p.m.)

(The Defendant entered the Courtroom.)

THE COURT: Let's see, we had a witness on the stand, is he here? Mr. Campbell. Do you know what happened to him, Mr. Horan?

MR. HORAN: I saw him at the elevator when I was coming up.

THE COURT: Was that on this floor or a lower floor?

MR. HORAN: It was down at the bottom.

THE COURT: Sometimes the elevators are -- are a problem.

MR. HORAN: Your Honor, when I got it was full. There were a bunch of people waiting for the next.

THE COURT: That's probably the problem.

(The witness resumed the stand.)

CROSS EXAMINATION

BY MR. GOEMANN:

Q Mr. Campbell.

A Yes, sir.

Q The records that you've been referring to, how

long have they been in your custody?

A How long have they been in my custody?

Q Yeah; as custodian of the records?

A Whenever this memo was, made me the custodian of the record, the copies of these files were -- they -- I don't want to say I'm in the custody of them. I mean, the copies I have with me today are the copies I made of Mr. Kansi's file just after the incident.

Q So that's back in 1993?

A Yes.

Q You made -- so the last time you saw -- is that the last time you saw the originals of the file?

A The original records were transferred out of my office about two or three days after the incident.

Q Now prior to them being transferred out of your office, did you compile the records?

A Did I compile them?

Q Yeah.

A No, sir; I pulled in the two files, reviewed them and made copies of them.

Q Do you know when then documents that became parts of that file were made?

A The days that they were dated and submitted to

the INS, as in like the applications -- I'm not sure what you're asking --

Q Well, the documents that are made are not made in your office, are they, the ones in that file?

A These -- the two files are two applications for two INS benefits. The files weren't completed by INS --

Q What office do you work out of?

A I work in the investigation section, sir.

Q Okay; and the applications that you're talking about are not made to the investigation section, is that correct?

A No, sir.

Q Okay; you said one is an application and you talked about it for asylum, is that correct?

A That's correct.

Q Where is that application made?

A It would be filed with the Washington district office, political asylum branch.

THE COURT: Can I ask a question. I'm not sure what we're doing. I guess I lost the bubble during lunch. Were you through?

MR. HORAN: Yes; I was finished, Your Honor.

THE COURT: Oh, okay; so you're question -- we're on cross examination, is that where we are?

MR. GOEMANN: That's where I am, Your Honor.

THE COURT: Okay; well, I wasn't there yet. I hadn't written down cross here yet, so I didn't realize we'd -- what we were doing. Now I'm with you.

BY MR. GOEMANN:

Q You said it would -- the application would have been made at he Washington District -- what was the name of the office?

A The political asylum application would have been filed at the political asylum branch. The amnesty application would have been filed with the office that was adjudicating amnesty applications at that time.

Q Okay; but this morning you testified specifically about the records from the asylum application, is that correct?

A I believe I mentioned them both but we went into depth about political asylum request.

Q And the amnesty office is not the office that you work from, is that correct?

A No, sir.

Q How did the records come to be in the custody

of your office?

A After the incident, I requested the file and had it sent over to my office.

Q Do you take part in the keeping of the records while they are in the amnesty office?

A No, sir.

Q So you don't directly keep those records at all, is that correct?

A No, sir.

Q You don't have any dealings with them at all prior to your sending for them, is that true?

A That's correct; yes.

Q And it's only after you send them that they become part of your records, is that right?

A After I send them where?

Q After you send for them, that's when they become in your custody?

A That's correct; yes, sir.

Q And you know what happens to them once they reach your custody, is that fair to say?

A Yes, sir.

Q How long were these records in your custody before they were sent away somewhere?

A A few days.
Q And after they were sent away, you don't know what happened to them after that, the originals?
A Haven't the slightest clue, sir.
Q So the only thing that you've really had in your custody for any length of time are these copies, is that correct?
A That's correct; yes. I mean, I had the original files at one point.
Q For a few days?
A Yes, sir.
Q And they were kept in your custody only pursuant to your investigation, is that true?
A Yes, sir.
Q Prior to coming to Court, did you undertake any kind of investigation to find the originals of these files?
A I believe in response to your FOIA request, my entire office searched every crook and cranny to find the files. So, it's been a pretty exhaustive search for the file.
Q And those originals could not be found?
A We don't have them, sir.

Q Now, are you familiar with an employee named Suzanne Plasaneka [ph]?

A Yes, sir; I knew her. I believe she's our FOIA officer.

Q All right; so she works in the same office or in some way connected with your office, is that true?

A She's the district FOIA officer.

THE WITNESS: I have a question, Your Honor. I've been provided with a letter from our District Counsel, that limits of the scope of my testimony and I think this is outside of that. Before I go much farther, can I have somebody say, hey, I can testify about this.

THE COURT: Well, I don't know what the next question is, so I guess we'll see what -- I'm not sure what any of this has to do with the motions today. But --

MR. GOEMANN: Well, Your Honor, it has to do with the integrity of the records that this office -- this gentleman relied on in his testimony.

THE COURT: Well, my notes from this morning and again, I've had lunch since and a frontal lobotomy or whatever, but my notes were that he didn't testify anything from the amnesty record nor from the -- what's the other word?

MR. HORAN: Asylum.

MR. GOEMANN: Asylum.

THE COURT: Asylum record. When he started to get into those, you objected or something happened and Mr. Horan said that's not what I'm talking about and then just said, did the records show that he ever re -- the question was, are there any other entries into the country.

And I -- apparently the witness interpreted it as entries in the record and started talking about these other two records, of which I haven't heard anything yet.

MR. GOEMANN: But, Your Honor, I --

THE COURT: It's not part of the case.

MR. GOEMANN: I'm sorry. My memory was that when the witness started talking about the amnesty record, Mr. Horan cut him off but that the remainder of his responses were made with reference to the asylum record.

THE COURT: I thought there were three files? Are there three files or two files?

THE WITNESS: There's two files.

THE COURT: Two files, asylum and amnesty.

THE WITNESS: Correct.

THE COURT: Okay; then I'm wrong again. Go ahead. I'm still not sure what it has to do with the

case, but go ahead.

MR. GOEMANN: Thank you. Your Honor, I'd like to have this marked.

(The document referred to above was marked for identification as Defense Exhibit No. 5.)

MR. GOEMANN: I'd show the Commonwealth what's been mark as Defense exhibit five for identification.

(Mr. Goemann hands a document to Mr. Horan for his examination.)

MR. HORAN: I don't know how it's relevant. It's -- I object on the grounds of relevance. It's their response to his FOIA request.

THE COURT: Well, I don't know yet, so, go ahead.

BY MR. GOEMANN:

Q Sir, I'd like to show you what's been marked as Defense exhibit five for identification.

(Mr. Goemann handed a document to the witness for his examination.)

Do you recognize the letterhead?

A Yes, sir; it says Immigration Naturalization Service.

Q And the FOIA officer signed at the bottom, do you recognize that?

A Right.

MR. HORAN: I object, he can't testify to the records of some other office, whether they're authentic.

MR. GOEMANN: Your Honor, I can ask if he recognizes the signature.

THE COURT: I overrule that objection.

THE WITNESS: I know Suzanne, I've never seen her signature.

BY MR. GOEMANN:

Q Okay; so you don't recognize that signature one way or another?

A No, sir.

Q Is there any other means by which you could recognize this document as coming from the INS?

A Aside from someone typing our name on it, that's it, sir.

Q All right.

A I --

Q Sir, at this point --

MR. GOEMANN: Well, Your Honor, at this point I would renew my objection to any testimony of this

witness based on the records. They clearly were not business records kept by this custodian and I believe the testimony on cross examination shows that.

Moreover, the originals of these documents cannot be found. There's no indicia of reliability concerning these copies of these records. They're not certified in any way. The originals are not producible and, in fact, this witness testified that -- they scoured the office for the originals and couldn't find them.

The originals, according to this testimony, were kept in an entirely different office and this witness does not know anything about how they were kept or the manner in which they were gathered or the system by which they were kept to show that they were kept in the normal course of business.

The only thing this witness can testify to is that during several days, pursuant to a specific investigative request by this witness, he received them and they were in his custody for a few days.

That is not sufficient to satisfy a business records exception or any other exception to the hearsay rule. And based on this additional information brought out on cross examination, I would renew my objection to

any of the evidence coming in, either -- based on -- both based on hearsay and based on confrontation clause because we are being denied the right to confront the documents and there is no showing of the reliability of these documents based on this testimony.

So I would once again object to it and ask that any testimony based on this witness's reading of those documents be stricken.

THE COURT: I overrule the objection. He testified that he was designated as the custodian of the records. He had the original records and these are copies of the original records so you have them right there. So that objection is overruled.

BY MR. GOEMANN:

Q Sir, in the records regarding the application for asylum, you testified that there was nothing in that file showing that he had re-entered the country, is that correct, after an entry in 1991?

A The file indicates how he entered the United States, was how he claims to have entered the United States.

Q All right; and there's nothing in there -- there's nothing in that file to show that he entered again

after that, is that correct?

A No, sir.

Q There's nothing to show that he left after that until 1993, is that correct?

A I have no record of Mr. Kansi or Mr. Kasi leaving the United States.

Q And the record also does show that a work permit was issued to Mr. Kasi sometime between 1991 and 1993, isn't that correct?

A I believe that was based on his claim for amnesty and his adjustment to gain lawful status.

Q All right; so, there was a valid work permit issued by INS during that time period, is that correct?

A Yes, sir.

MR. GOEMANN: Nothing else, Your Honor.

THE COURT: Anything else?

MR. HORAN: Nothing.

THE COURT: May he be excused?

MR. HORAN: He may, Your Honor.

THE COURT: Okay; you're excused and free to go or stay as you wish. Thank you.

(The witness was excused.)

THE COURT: Any further evidence from your

side?

MR. HORAN: That's it, Your Honor.

THE COURT: Okay; anything -- further evidence, rebuttal evidence?

MR. GOEMANN: Your Honor, we're just dealing -- I just want to be clear. We dealing only with the issue at this point of whether Mr. Kasi has a sufficient connection to the United States to fall within the rule of Verdugo-Urquidez. On that issue I have no further evidence.

THE COURT: I thought we were dealing with the whole motion and this was a portion of that.

MR. GOEMANN: Well, Your Honor, I have -- I believe I have shouldered the burden that we have at this point to show that the fourth amendment protection should apply to Mr. Kasi.

THE COURT: And that it's been violated. Is that --

MR. GOEMANN: No, Your Honor; I don't believe I have the burden to show the violation. I believe the Court last week ruled that the Defendant had the burden to show the substantial connection to the United States.

THE COURT: Oh, okay; so, you want a ruling on

that at this point.

MR. GOEMANN: Well, I don't have any further evidence on that point. If the Court wishes Mr. Horan now to go forward with his burden, I don't object to that. But I don't have any further evidence on that point.

THE COURT: Okay; I'll hear your argument why you think you've met that burden.

MR. GOEMANN: Your Honor, first of all to be clear and to simplify matters, the case -- the case law does not require in order for Mr. Kasi to fall within the protections of the fourth amendment that he be a citizen of the United States. Verdugo-Urquidez clearly says that the person has to be a class of persons who have developed a sufficient connection with this country to be part of the national community.

And one need not be a citizen, in fact, in Verdugo-Urquidez, they -- the Court specifically refers back to an earlier case, INS versus Lopez Mendoza at 468 United States 1032, a 1984 case.

In that case the -- the Defendants were illegal aliens and that was clear from the record. And the Court, in commenting on that case said, even assuming such aliens would be entitled for fourth amendment

protections, their situation is different from Respondent's. Respondent being Verdugo-Urquidez.

The illegal aliens in Lopez Mendoza were in the United States voluntarily and presumably had accepted some societal obligations. So that language, Your Honor, I believe gives us at least some parameters for making a decision here. There must be a voluntarily -- voluntary residency in the United States or entry and residency in the United States and the acceptance of some societal obligations. Enough at least for clearly illegal immigrants to have taken on.

Your Honor, there is no evidence that Mr. Kasi was an illegal immigrant at all to begin with. The only evidence the Court has is that he entered the United States in 1991. Once here, he moved -- he lived in Virginia, he lived in Chantilly and worked odd jobs for a while before meeting up with Mr. Eshei.

Once he met up with Mr. Eshei, the evidence is that he actually invested in a business in the United States. He gave Mr. Eshei five thousand dollars for their moving business and with that they bought capital, they bought a truck. And Mr. Eshei testified that Mr. Kasi wanted to get to know the business, learn his way around

Virginia and clearly Mr. Kasi was showing a -- an intent to become part of the people of the United States at that point. He was actually investing in a business here.

Moreover, the evidence is that in 1993, he was first of all still living in Virginia. Mr. Mir testified that he lived with him as a roommate from August of 1992 to January of 1993 and then there was also testimony that Mr. Kasi was contracted with Excel Contract – Excel Couriers to be an independent contractor with that company.

For that they required a driver's license, they required insurance and they required a social security number. And each of those things Mr. Kasi had and each of those things additionally shows his connection to the United States and to -- well, specifically Virginia but even more generally to the United States.

Moreover, we just have the time period. We have from January of 1991 to January of 1993, two years. In the cases like Verdugo-Urquidez -- in that case, of course, the Defendant had no connection to the United States. There was no evidence that he had ever been here except for the fact that he had been brought here by -- by federal agents. And the Court in that case said, well,

that's not -- that's not enough. Simply bringing someone here and then bringing -- being brought to trial is not enough.

But Lopez Mendoza, I think, clearly indicates and the Court in Verdugo-Urquiez's comment on it shows that it really doesn't take all that much. Mr. Kasi clearly has far more -- far more than any of -- than that he came here voluntarily and presumably accepted some societal obligations. We have a driver's license, we have a social security number, we have driving insurance, we have investing in a company here, we have his -- his working with a company before that, Ace Movers, the testimony was that he did not work regularly with them but that he did some work for them, and then his work for the courier service.

He was living here and I think the evidence shows that he was living here fairly consistently. I mean, there -- there's no evidence that he ever left during that time period and, in fact, the testimony of the INS agent shows that he -- that there's no evidence that he left. And the evidence is that he had a valid work permit during that time period.

So he, in essence, used -- utilized the

processes of the government -- the United States government, which again shows a voluntary acceptance of the obligations of this society.

He did not sneak across the border. He came in, filled out papers and went through a process and the testimony was that he had applied for political asylum. He applied for a work permit and was granted one.

All of these things, Your Honor, show that he is accepting societal obligations and making a connection with the United States.

There is no case law directly on point as to how much is required. The only case I was able to find on the subject, said basically, even assuming that he's shown, these contacts -- they don't decide it one way or other. They just say, even assuming it, we find that under the fourth amendment, that the claim must fail. But they don't decide this and I haven't been able to find any case law that really fleshes out the parameters of what this language means. I suppose it's because the case is so recent, Verdugo-Urquidez, a 1990 case.

There hasn't been any case law that I've been able to find to show what the parameters of this -- but whatever they are, I think Mr. Kasi has clearly shown

during that two year period that he took on sufficient responsibility in this country and made sufficient connections to the government to meet the standard of Verdugo-Urquidez and I would ask that the Court so find.

THE COURT: Mr. Horan?

MR. HORAN: Your Honor, the issue is whether or not on a -- an alien -- that alien accumulates, while here, some constitutional rights that he carries with him when he goes abroad. That was answered resoundingly, no, in the United States versus Verdugo-Urquidez. Answered by the United States Supreme Court when they said, the available historical data show, therefore, that the purpose of the fourth amendment was to protect the people of the United States against arbitrary action by their own government.

It was never suggested that the provision was intended to restrain the actions of the federal government against aliens outside the United States. That's found in 494 United States at page 267.

The case they cited the other day, Barona out of the 9th Circuit, really puts it in pretty good context. The only reason we're here even talking about it is because the fourth amendment by its terms only applies to

the people.

You have to find out who the people are. And it is clear that there may be some reasons why you become part of the people for purposes of the fourth amendment while you are within this country. That's a totally separate question of whether or not somebody could come here on a student or business Visa, remain here for two years and then leave and go to Tibet to remain for the rest of their natural lives.

And does the fourth amendment of the American Constitution travel with them to Tibet? That's really what they want here. They want to say that that constitutional provision is over there with them. Now, Barona, which they cited the other day says this, the term People of the United States includes, quote, American citizens at home and abroad and lawful resident aliens within the boarders of the United States who are victims of actions taken in, and they italicize, in the United States by American officials. Do you know a case they're citing? The are citing the opinion in Verdugo-Urquidez when it was in the 9th Circuit, a case that was later reversed by the United States Supreme Court.

They want a point out of page 1094, in Barona,

for the record is 56 Federal 3d 1087, page 1094 it says this, it is yet to be decided, however, whether a resident alien has undertaken sufficient obligations of citizenship or otherwise develop sufficient connection with this country to be considered one of the people of the United States, even when he or she steps outside the territorial borders of the United States.

Barona says that's yet to be decided. I would suggest to the Court that -- that the Barona court, the 9th Circuit Court that was reversed by the United States Supreme Court in Verdugo, misreads Verdugo.

The United States Supreme Court specifically use in the language, resident aliens outside the borders, says the fourth amendment doesn't apply. In all the conversation about whether or not they are the people, for purposes of the fourth amendment, misses the point.

They may be part of the people when they're within our borders but they certainly aren't the people for purpose of the fourth amendment when they go to foreign land.

We would otherwise really have the -- the rather unbelievable constitutional result that if you once lived here, buy a truck for five thousand dollars and stay

around for two years, you would then for purposes -- seemingly, if the right is there, seemingly until your old age, you would be wrapped with the fourth amendment of the American Constitution.

And I submit to the United States -- I submit to this Court, the United States Supreme Court at least mentioned it in Verdugo, if there was any possibility that was true, they do not. They close out the extra territorial power of the fourth amendment and that's what we're talking about here, Your Honor. We ask you to deny the motion.

MR. GOEMANN: Your Honor, Verdugo clearly does not deal with this situation, so there was no reason for them to address what happens when someone comes to the United States and then leaves. So, I don't think the Court could look to Verdugo-Urquidez to solve this problem. It's plainly one of those kinds of issues that they left for the Courts to decide after that. It was just not necessary.

In Barano, [sic] Mr. Horan cites language of the case that was overruled eventually and I'm -- quite frankly, I'm not sure I understand why he's citing this -- this bad law from Barona but apparently -- it's just not

applicable.

Verdugo-Urquidez was dealing with somebody who had not been in the United States period. There's no evidence of the contrary.

And the two issues there are, does the fourth amendment apply to the place and then does it apply to the person. And here the fourth amendment we argued last time and I think the Court, at least impliedly ruled, that the fourth amendment would apply when the FBI went to another country and seized Mr. Kansi.

Quite frankly, I don't know that it is terribly absurd to think that the fourth amendment applies when federal agents go and seize someone who has lived here for a year -- for several years and made connections with this county. I don't know that -- I don't understand why that's -- why that's an absurd proposition.

We're not talking about the fourth amendment simply applying in the abstract, we're talking about it applying when federal agents go and seize somebody and bring him back to the United States.

And when that person is someone who developed the substantial connections that are required by Verdguo [sic]- Urquidez, then the fourth amendment applies and to say

that -- to try to reduce this to sort of an absurd scenario, I think really misses the point.

If someone has been here for several years then the fourth amendment does apply to them and Reed versus Covert, clearly says that, the fourth amendment is not bound by the borders of the United States. If it applies to you here, then when you go across to another country, the fourth amendment applies to you. And that's what Reed was all about.

So there's no -- it doesn't -- the protections that you have here don't stop at the border and I don't think any of this case law can be read to indicate that. And I would ask that the Court find that we did meet our burden here. I'll stop at that.

THE COURT: I find that the fourth amendment does not apply to Mr. Kasi's, we'll call it arrest. I don't know whether I'm using the right word or not but let's call it that, in Pakistan, but we're in a foreign country by the FBI. The Defendant's evidence shows that he is not one of the people to whom the fourth amendment applies.

He was last in this country four and a half years before the event that I'm calling the arrest. He's

not a U.S. citizen. There's no evidence he had any contact with the United States in the intervening period of time and the arrest occurred in a foreign country. And under those facts, he is not entitled to the protection.

Now, on the -- it's always possible that I'm wrong about that and if you want to present evidence or argue the point that -- I mean the evidence was presented, I take it, at least in part by Agent Garrett last week. If you want to argue the point of whether the fourth amendment, if it applied, was violated or not, you may in order to give the Appellate Court the chance to say, well, you're wrong about that but it does or doesn't apply.

MR. HORAN: Well, Your Honor, it is very hard from reading the United States Supreme Court cases to find out just what sort of connection they're talking about.

THE COURT: No; I'm not talking about connection. I'm talking about assuming that I'm -- I said it didn't apply. Assuming I'm wrong about that, then some Court needs to decide whether the fourth amendment was, in fact, violated or not.

MR. HORAN: Well, I --

THE COURT: If they -- if they wanted to say that it did apply. So, I'm offering you an opportunity,

if you want it, to present further evidence or to argue the point or not. Because if you don't, then they can say, well it -- it does apply and they can come back or whatever.

MR. HORAN: Well, certainly under United States law, Agent Garrett of the Federal Bureau of Investigation had the right under our law to arrest a felon who had fled from this country. He had probable cause to do so under our law and he had an unlawful flight to avoid prosecution warrant that he was aware of. Of course, he couldn't serve in the foreign country because it doesn't have legal validity in that foreign country.

But certainly under our American law he, a, had probable cause to make the arrest; and, b, once he had that probable cause to make the arrest he could seize him as a citizen matter. He could make a citizen arrest. He doesn't have to call it that but he's got the legal right to make that citizen arrest. He could make it in Canada. He could make it in Mexico. It doesn't effect the validity of the act that he's performing. It just deals with the whole question of acting outside the territorial jurisdiction that he has.

Counsel uses the term, abduction. I would

submit to the Court that the evidence here is not one of abduction. This police officer could not, under American law, be abducting this Defendant at the time he's placing him under arrest. He had a right to under our law. And if he didn't have the power, the territorial power in the location where he was found, he certainly had the legal power to arrest him at that time.

In fact, he not only had the legal power under his duty as a federal agent and being aware of that warrant, he had to contain him if he could and that's what he did.

So the notion of if we've got an abduction here, it's just not true. The question is, what does he do once he gets him and of the evidence before Your Honor, he attempted to get him back to the United States where he's back in this jurisdiction and he had a right to do that also.

THE COURT: Okay; do you want to say anything?

MR. GOEMANN: Well, Your Honor, I'm not sure what evidence Mr. Horan is referring to. I mean, the evidence in this case --

THE COURT: The evidence of Agent -- the evidence of Agent Garrett is what he's relying on.

MR. GOEMANN: Well, I -- this might be overly technical but I don't think any of that is evidence in this -- in this motions hearing. The only evidence in this motions hearing is that which I presented from my three witnesses and the evidence of the --

THE COURT: I received the evidence of Agent Garrett in this motion as well. If you want to -- if you want to present something else, you may.

MR. GOEMANN: Court's indulgence.

THE COURT: Or you can ignore the whole thing and rely on the Appellate Court to rescue you, if you want to.

MR. GOEMANN: Your Honor, I'll argue based only on that evidence at this point.

Your Honor, the testimony I recall from Agent Garrett is that, first of all, he did not have any authority to make arrest based on any document that he had from the United States or any document in Pakistan.

And indeed, from -- there was no warrant of any kind executed on my client in Pakistan.

And I don't think there was any testimony about that and, in fact, I think that the stipulation was that there was no paper or document that could have served

as a basis for an arrest from Pakistan and there was no evidence presented that was any document that was the basis for an arrest outside of the United States and, in fact, outside of Virginia that could lawfully be used to effectuate an arrest.

So first of all, I -- I don't think the evidence supports this having been an arrest at all. What happened, and I believe Agent Garrett testified, was that he was over there to seize Mr. Kasi and turn him over to Pakistani authorities. That's not an arrest under United States standards. It's a seizure under the fourth amendment I submit, but it is not an arrest. And he explicitly said, he was there to seize this person. I'm not sure that he necessarily used the word seize, but find him and turn him over to Pakistani authorities.

And, in fact, that's what he did. He seized him and turned him over to Pakistani authorities and then sat and watched him for two days in a cell somewhere, in some building, somewhere in a foreign country. That is certainly a seizure within the fourth amendment and Mr. Kasi was -- and then, of course, after the two days, someone calls up and says, okay, he's good to go. And they cart him off to the United States.

There is no evidence of a warrant from Pakistan being executed. There's no evidence of a warrant from the United States being executed. It's basically a warrantless seizure. And I use the term abduction, if Mr. Horan doesn't like that, I submit he can find one. But arrest isn't the word.

The question then becomes, was this a reasonable seizure under the fourth amendment. And we have heard absolutely no evidence as to the necessity or the reasonableness of this conduct.

There is evidence in the record that there was an extradition treaty between the United States and Pakistan. The Court found this morning that Mr. Kasi does not have any right to have a -- does not have any direct rights to enforce the treaty.

However, the fact that a lawful process existed to bring Mr. Kasi back to the United States is evidence that the -- that a lawless method of bringing him back to the United States is unreasonable and that the government should have the burden of showing that the steps that they took were reasonable. That is was reasonable for them not to utilize this law.

There are other instances, Your Honor, where

-- Court's indulgence.

Other instances where other standards are utilized in determining whether something was reasonable or not under the fourth amendment. The manner in which someone is being seized. There's the knock and announce rule, a rule -- a common law rule that the Court looks to, to determine a reasonableness of the fashion of a seizure.

There are rules outside of the fourth amendment directly which inform a -- the Court's choice, excuse me, the Court's analysis of whether a search was reasonable. Is an inventory search being done according to department regulations. Is a roadblock being done according to specific regulations. So, there's certainly precedent for looking outside of the fourth amendment to determine the reasonableness of police conduct. And that's what we have here, Your Honor.

We have police conduct that, at least on a prima facia level, violates a law which is created to explicitly for the purpose of retrieving persons wanted in the United States from another country. Here the evidence is clear that they did not utilize that law. There's no evidence that they utilized any other legal process and the evidence is that there was no arrest made in Pakistan

pursuant to any kind of legal process.

And for all those reasons, Your Honor, the Commonwealth has not shown that the manner of this seizure was reasonable and therefore had the Court ruled that the fourth amendment applied to Mr. Kasi, we would ask that the Court suppress the evidence because the manner of the seizure was unreasonable.

THE COURT: I think that the argument points up why you just can't apply the fourth amendment to a foreign national seized, I'll use your word seized. I think my word arrest is not the right word, with all of the other baggage that it carries, why you can't apply the fourth amendment to a seizure in a foreign country of a foreign national.

Mr. -- I think Mr. Horan stipulated that the FBI didn't have any jurisdiction there. So it is like a citizen doing this and the citizen seized Mr. Kasi, turned him over to a foreign country, later was -- received him back and brought him back here. And it is simply not within any fourth amendment idea. It's reasonable but not if you -- not if you're going to require that they have some kind of jurisdiction in the foreign country, because they don't.

So I think it's a circular argument and I wasn't as successful in getting to a point where I could make it clear for an Appellate Court as I had hoped, because you -- I'm chasing my tail. It -- the fourth amendment simply doesn't apply. But you have other motions.

MR. GOEMANN: Yes, Your Honor.

THE COURT: Okay.

MR. ROMANO: I think we're at a point where again, we say the fifth amendment applies and Mr. Horan says, no it doesn't.

THE COURT: Let's see, now which --

MR. ROMANO: Motion to Suppress the statement allegedly made to a Sheriff's deputy.

THE COURT: Okay.

MR. ROMANO: Your Honor, we've been apprised of the fact by Mr. Horan that supposedly there was a statement made by Mr. Kasi to a Sheriff's deputy on July 24th. We'd move to suppress it as violating the fifth amendment.

If the Commonwealth -- our position is that the Commonwealth intends to introduce this statement. They have to prove that it is constitutionally valid.

APPENDIX Z

VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

v. : Docket No. K79148

MIR AIMAL KANSI :

Defendant. :

MOTION TO SUPPRESS EVIDENCE

Defendant, Mir Aimal Kansi, through counsel, respectfully moves this Court to suppress as evidence against him any statements, objects or information gathered as a result of his seizure in this case as having been obtained in violation of the fourth amendment to the United States Constitution and Article 1, Section 10 of the Virginia Constitution. In support of this motion, counsel states:

1. Some time at the beginning of June 1997, the defendant, Mir Aimal Kansi, was abducted from Pakistan by police forces of the United States acing pursuant to a capias issued by the Circuit Court of Fairfax County. The abduction was a seizure under the United States and Virginia Constitutions.
2. At the time of the abduction, an extradition treaty existed between the United States and Pakistan which described the procedures required when one country requested that the other country deliver up a person accused of a crime in one jurisdiction who is found within the territory of the other jurisdiction. Such was the case here where Mr.

Kansi, accused of a crime in the United States was found within the territory of Pakistan. In addition, both countries have enacted statutes which create procedures to carry out extradition requests.

3. The abduction – seizure of Mr. Kansi was accomplished in violation of the Extradition Treaty between the United States and Pakistan and without invoking the procedures set out by the laws of each country. The manner in which the seizure was made was therefore illegal and unreasonable and violated the United States and Virginia Constitutions.

4. Because the manner in which Mr. Kansi was seized was unconstitutional, any evidence secured as a result of the seizure must be suppressed.

WHEREFORE, for the foregoing reasons, and any further reasons which may appear to the Court following a hearing in this matter, the Defendant respectfully requests that his motion be GRANTED.

Respectfully submitted,
MIR AIMAL KANSI
By Counsel

S/_____

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VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

v. : Docket No. K79148

MIR AIMAL KANSI :

Defendant. :

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Whether the Fourth Amendment requirement that seizures be reasonable is satisfied in a particular case "depends on not only when a seizure is made, but also how it is carried out. Tennessee v. Garner, 471 U.S. 1, 8 (1985). See also Graham v. Connor, 490 U.S. 386, 394-95 (1989). Garner and Graham make clear that when analyzing a Fourth Amendment claim, a court must analyze the reasonableness of the manner by which a seizure was made. While these cases arose in the context of civil lawsuits alleging Fourth Amendment violations, the analysis is the same no matter the context. See Garner, 471 U.S. at 8-9 (citing to criminal cases in support of the Court's analysis).

If the manner of seizure was unreasonable, any evidence secured by the seizure must be suppressed. In Schmerber v. California, 384 U.S. 757 (1966), the appellant claimed that the manner in which the police seized blood from his person was unreasonable in violation of the Fourth Amendment and should therefore be suppressed. The Court found that "the Fourth Amendment's proper function is to constrain...against intrusions...which are made in an improper manner." Schmerber,

384 U.S. at 768. The Court proceeded to analyze whether "the means and procedures employed in taking [appellant's] blood respected relevant Fourth Amendment standards of reasonableness." Id. Ultimately the motion to suppress was denied because the record showed that the test was performed in a reasonable manner. Id. at 771. Thus, if police seized the defendant in an unreasonable manner, the seizure would have violated the fourth amendment and any evidence resulting from the seizure must be suppressed. See generally W. LaFave, 3 Search and Seizure 34 (3d ed. 1996) (when manner of arrest involves excessive force and is therefore illegal, evidence resulting from arrest should be suppressed).

To perform the analysis required by the Fourth Amendment, a court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" Garner, 471 U.S at 7-8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)). In the instant case, Mr. Kansi was accused of a crime in the United States and was found within the territory of Pakistan. The procedures to be followed by the United States in such a circumstance are explicitly spelled out in the Extradition Treaty that exists between the two countries. That treaty describes the procedures agreed to by both parties to "deliver up...those persons who, being accused...of any of the crimes or offences [sic] enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party." Extradition Treaty, Dec. 22, 1931, U.S.-Pak., art 1, 47 Stat., 2122 (treaty signed between United States and Great Britain; currently in force between United States and Pakistan;

Article 3 includes the crime of murder). In addition, both countries have promulgated statutes implementing the treaty. See 18 U.S.C. 3181 et seq. (United States); Extradition Act, 1972 (Act XXI of 1972) (Pakistan) (attached). The statutes grant the accused the right to a hearing and to present evidence. Indeed, one defense to extradition contained in the Treaty and explicitely accounted for in Pakistan's Extradition Act is the right to present evidence that the offense of which the defendant is accused is an offense of a political character. Extradition Treaty at Article 6; Extradition Act § 8 (2). Arguably, the United States' branding the allegations as terrorism would have provided the basis for such a defense. See Fairfax Journal 6/18/97 at A1 (quoting Commonwealth's Attorney Robert F. Horan, Jr. as saying "We considered it an act of terrorism from the very start."); Fairfax Journal 6/20/97 at A10 (quoting President William Clinton as commenting that the arrest of Mr. Kansi "showed the Unites States 'will not relent in the pursuit of terrorists'").

However, Mr. Kansi was not seized in accordance with the law of either the United States or Pakistan. Instead, he was forcibly abducted, held incommunicado, and flown to the United States without any of the protections afforded by the extradition Treaty or the statutes implementing that Treaty. In light of the legal procedures in place at the time of his abduction from Pakistan, it was unreasonable for the Commonwealth to seize Mr. Kansi in the manner of an illegal kidnapping. Because the seizure was unreasonable, it violated the United States and Virginia Constitutions and all evidence which resulted from the seizure should be suppressed.

WHEREFORE, for the foregoing reasons, and any further reasons which may appear to the Court following a hearing in this matter, the Defendant respectfully requests that his motion be GRANTED.

APPENDIX AA

VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

v. : Docket No. K79148

MIR AIMAL KANSI :

Defendant. :

RESPONSE TO MOTIONS TO SUPPRESS STATEMENTS

The motions to suppress the Defendant's statements allege four grounds for suppression. They are as follows:

1. That the Defendant was seized in violation of the 4th Amendment and therefore the statements are inadmissible.
2. That the government failed to present the Defendant to a judicial officer without unnecessary delay.
3. That the statement was taken in violation of the Fifth and 14th amendments of the United States Constitution and Article 1, §8, of the Virginia Constitution.

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4. That police agents faiied to advise the Defendant of his rights under the Vienna Convention on Consular Relations.

The response will be made in the above order.

1. That the Defendant was seized in violation of the 4th Amendment and therefore the statements are inadmissible.

The defendant in this case is an alien who is not now, nor has he ever been, a citizen of the United States. He was lawfully seized in the nation of Pakistan. However, whether that seizure was legally and technically correct is absolutely immaterial. The Fourth Amendment of the United States Constitution does not apply to either a search or a seizure of a non-resident alien located in a foreign country. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). As was said in that case by the Supreme Court at page 267:

> "The available historical data show therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.
> There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."
> The Court went on to say, at page 275:
> "We think that the test of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim."

In short, since the Fourth Amendment does not apply in Pakistan, the statements could not have been obtained in violation of that amendment.

2. That the government failed to present the Defendant to a judicial officer without unnecessary delay.

Assuming for purposes of this argument that Pakistani law applies, and assuming that the Defendant should have been taken before a Pakistani magistrate, the motion to suppress on these grounds must nonetheless fail. This case is controlled by the Virginia Supreme Court decision in Frye v. Commonwealth, 231 Va. 370 (1986). The exclusionary rule applies only to constitutional violations. As was said in Frye, "Failure promptly to present a defendant as required by Code §19.2-82 is a mere procedural violation where it involves no constitutional error." Id. at 376. Whether one applies Pakistani law or Virginia law, the error (assuming there was one) was statutory. Violation of the statutory law "reaches constitutional dimension only if it results in the defendant's loss of exculpatory evidence." Horne v. Commonwealth, 230 Va., 512, 519 (1986).

3. That the statement was taken in violation of the Fifth and 14th amendments of the United States Constitution and Article 1, §8, of the Virginia Constitution.

The evidence in this case will be that on June 17, 1997, the Defendant was advised of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). (A copy of that advice of rights form was provided to the defense months ago and is attached hereto.) Kansi indicated to Special Agent Bradley J. Garrett of the Federal Bureau of Investigation that he understood

those rights, that he would freely and voluntarily talk to the agents, and was willing to make a statement about his involvement in the CIA killings. He freely and voluntarily signed the waiver of rights form.

A defendant's waiver of his Miranda rights is valid when the waiver is made knowingly, voluntarily and intelligently. Jenkins v. Commonwealth, 244 Va. 445, 453 (1992). Such a waiver was knowingly done here by a college graduate with a master's degree in English. The test for voluntariness is whether the statement is the product of an essentially free and unconstrained choice by its maker. Id. at 453. The evidence in this case will clearly be that the statements of June 17 were freely and voluntarily given after a knowing and intelligent waiver. The Commonwealth asks that the motion to suppress be denied.

4. That police agents failed to advise the Defendant of his rights under the Vienna Convention on Consular Relations.

The Vienna Convention, "even if it could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create constitutional rights. Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional* rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that a

treaty must 'be regarded in courts of justice as equivalent to an act of the legislature')." Murphy v. Netherland, 116 F.3d 97 (1997).

Statutory violations as distinguished from constitutional violations, do not trigger application of the exclusionary rule. See Frye v. Commonwealth, supra. Therefore, this grounds for the motion to suppress should be denied.

Respectfully submitted,

S/_____

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motions to Suppress Statements was hand-delivered to Richard C. Goemann, Counsel for Defendant, this 16th day of October, 1997.

S/_____

ROBERT F. HORAN, JR.
Commonwealth's Attorney

APPENDIX BB

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	:	
vs.	:	CRIMINAL
	:	NO.79148
MIR AIMAL KASI,	:	
a/k/a MIR AIMAL KANSI	:	
Defendant.	:	

Courtroom No. 5G

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 27, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:02 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth's Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

CONTENTS

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
WILLIAM WHILDEN	28	46	57	65
ZAHID MIR	93	94	--	--
KHAN ASGHAR	96	99	--	--
NASIR ESHEI	103	108	--	--
JEFF FREDERICK	113	118	--	--
THOMAS CAMPBELL	124	137	--	--
DAVID CLARK	171	178	--	--

****

EXHIBITS

	MARKED FOR IDENTIFICATION	RECEIVED IN EVIDENCE
DEFENSE EXH. NOS. 1-3 (Affidavits)	72	72
DEFENSE EXH. NO. 4 (Employment documents)	115	115
COMMONWEALTH EXH. NO. 1 (Immigration document)	128	130
DEFENSE EXHIBIT NO. 5 (Response to FOIA Request)	145	
DEFENSE EXHIBIT NO. 7	194	194

(Newspaper articles)
DEFENSE EXHIBIT
NO. 1A-F 198 198
(Video tapes of news reports)
DEFENSE EXHIBIT NO. 8 199 199
(Response to subpoena)

* * * * * * * * * * *

PROCEEDING

(The Court Reporter was sworn.)

THE COURT: Okay; I believe we have defense motions today, right? What one do you want to start with?

MR. GOEMANN: Your Honor, the Court wishes to take that up before the voir dire issues?

THE COURT: Yes.

MR. GOEMANN: All right; the Motion to Dismiss?

THE COURT: The Treaty Motion?

MR. GOEMANN: Yes, Your Honor.

THE COURT: Okay.

MR. GOEMANN: Your Honor, I would ask the Court's permission to incorporate the testimony of the FBI agent from last week into the record for the purposes of the -- this motion's hearing.

THE COURT: All right.

MR. GOEMANN: And I would also ask that the stipulations that were offered last week are still applicable to this motion this week.

MR. HORAN: I'm still trying to figure out which motion we're doing now.

MR. GOEMANN: The Motion to Dismiss to lack of

jurisdiction.

MR. HORAN: Yes.

MR. GOEMANN: Thank you.

MR. HORAN: For the purpose of this motion only, Your Honor.

THE COURT: Yes.

MR. GOEMANN: Your Honor, last week I passed up a copy of the Treaty that this motion relies upon. And in addition, attached to the Motion to Suppress that the Court still has to hear, is a copy of the statute from Pakistan which effectuates the Treaty, the Extradition Statute.

Your Honor, last week the Court heard evidence that Mr. Kasi was seized in Pakistan and there's a stipulation that he was seized in Pakistan by the FBI and that the FBI agents who arrested him had no jurisdiction in Pakistan. That the Defendant was not taken before a judicial officer of any type before he returned to the United States and that the seizure of the Defendant was not made pursuant to any Pakistani paper or document.

However, the Court also heard testimony that at some point during that process the FBI turned custody over to Pakistan. I believe early in the hearing the

agent testified simply that he was in the custody of a foreign power. I believe on cross examination, eventually after a rather lengthy pause, he finally admitted that at some point during that process he was in the custody of Pakistan.

Your Honor, all of those facts indicate that the Extradition Treaty and the provisions of the Extradition Treaty between the United States and Pakistan should have been triggered when Mr. Kasi was taken into custody and put into Pakistani custody. At that point, the Pakistani extradition law should have been applied and under the United States Pakistan Extradition Treaty, the laws of each sovereign are to govern when somebody is taken into custody pursuant to that Treaty.

And in this case you have Mr. Kansi taken into custody by the Federal Bureau of Investigation, given over to the government of Pakistan and then at some point later, at least two days later, returned to the FBI for a flight back to the United States.

Once he was placed into the custody of Pakistan, Pakistani law governing extradition should have been followed. And because it was not followed, it was a violation of the United States Pakistan Treaty.

That takes this case outside of the Alvarez Mochane case. As the Court is well aware, I'm sure, in the United States versus Alvarez Mochane, the United States Supreme Court found that there was no violation of a treaty between the United States and Mexico and based on the fact that there was no violation of the treaty, they found that the general rule of Kerr versus Illinois applied, which basically states that the manner in which a Defendant is brought into the jurisdiction of the Court does not effect the Court's jurisdiction. But the Court distinguished Kerr or said that Kerr would be distinguishable if there had been an actual violation of the Mexican United States Treaty. And in that case the Court went on to find that no such violation had occurred.

In this case, however, Your Honor, the Treaty between the United States and Pakistan specifically states that the extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and the territory of Pakistan respectively in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

And here, there was no conformity with the

laws of the territory from which the surrender was to be claimed. That is the laws of Pakistan. The violation of the laws of Pakistan therefore became a violation of this Treaty and therefore different from Alvarez Mochane. And since it is different from Alvarez Mochane, Your Honor, I submit that the -- because there was a violation of that Treaty, that therefore takes this case outside of the rule of Kerr versus of Illinois and robs this Court of jurisdiction to hear this matter.

THE COURT: Anything? Do you want to -- I've read your response memorandum, adding it on.

MR. HORAN: Your Honor, I would only comment to the Court, we are precisely within the situation that as involved in Alvarez Mochane. Just as in that case, he wasn't brought here under the Extradition Treaty as was the case in Alvarez Mochane. He wasn't brought here under the Treaty either.

The Supreme Court of the United States said, that the only time you can look to the Treaty for help is when he's brought here under it. Neither Alvarez Mochane or this Defendant was brought here that way, the Supreme Court holding in Alvarez Mochane covers this case and we ask the Court to deny this motion.

THE COURT: Anything else you want to say, Mr. Goemann, about that?

MR. GOEMANN: No; Your Honor.

THE COURT: All right; I do not find -- well, I find that the Treaty -- I find that the Treaty is a matter of -- between the United States government and the government of Pakistan. It does not afford any individual an individual right to have the Treaty followed or not followed or to get the case dismissed if it is or isn't followed.

Mr. Kasi is before the Court now and we have the jurisdiction to try him for the alleged crimes here. So I deny the motion. The next motion.

MR. GOEMANN: Your Honor, If I could just ask if certain witnesses are present in the Courtroom?

THE COURT: All right.

MR. GOEMANN: Jeff Frederick, Bill Rich, Christian Orchetty [ph].

(No response.)

MR. ROMANO: Your Honor, I have two motions which I believe are resolvable. One is, a notice and motion for daily transcript of the proceedings.

THE COURT: Uh-huh.

APPENDIX CC

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COURT

----------x

COMMONWEALTH OF VIRGINIA, :

vs. :

MIR AIMAL KASI : CRIMINAL

a/k/a MIR AIMAL KANSI, : NUMBER 79148

Defendant. :

----------:

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

AFTERNOON SESSION

(The Court reconvened at approximately 2:00 o'clock p.m.)

speak.

So that motion to suppress is denied. And we're onto the next one I guess.

MS. BARGER: Your Honor, I will be addressing the motion to suppress pursuant to the the defendant not being informed of his rights under the Vienna Convention, but it's entitled like many of the other ones Motion to Suppress.

THE COURT: Well, let me be sure. I think that may be the one that we – let's see. Is that this one?

MS. BARGER: Yes.

THE COURT: Okay. This is the one we just ruled on. And this is the memorandum that goes with it.

MS. BARGER: Yes, it is.

THE COURT: All right. Well, could I just ask you a question at the beginning?

MS. BARGER: Yes, Your Honor.

THE COURT: Because I thought I cleared this at the beginning, whoever it was who at the beginning along about 10:00 o'clock or so. Do you take the position that a violation of this Vienna Convention if it does not rise to the level – that the violation of the Vienna Convention in and of itself

requires suppression?

MS. BARGER: No, Your Honor.

THE COURT: Okay.

MS. BARGER: Our position is that in this case – and to put it very simplistically, that the defendant's rights pursuant to the Vienna Convention which are that they have the right to contact their consul and once they are taken into custody they are to be told of that right without delay according to Article 36 under the Vienna Convention. That is attached to the memorandum, Your Honor.

THE COURT: And so that I can focus on your argument so I won't be worried about whether there is one, there isn't any case, is there?

MS. BARGER: Any case that says that?

THE COURT: Any case that suppresses the evidence based on one not being told about their rights under the Vienna Convention.

MS. BARGER: There is none because that argument has never been made, Your Honor.

THE COURT: Okay. Then I want to hear your argument.

MS. BARGER: The cases that are cited by the

Commonwealth, the first one really from 1829 doesn't say obviously anything about the Vienna Convention because that was over a century before it was enacted, Your Honor.

But in Murphy versus Netherland, the other case, that this is the more recent case cited by the Commonwealth's Attorney at 116.FED.3rd.97. That case basically dealt with habeas issues. In that case the defendant was charged with capital murder. He entered a plea of guilty.

The Vienna Convention issue was never brought up at the trial level, it was not brought up on direct appeal. The issue wasn't thought of or brought up until a habeas position was filed just shortly before his execution.

So that issue and that opinion what the Court addressed is the fact that their arguments were procedurally defaultive because they never raised them. Not only did they not raise them at the trial level or on direct appeal, but the Constitutional issue and the language that the Commonwealth cites in that case is essentially in the Murphy case they had two arguments.

The first one was that a violation on the Vienna Convention is in and of itself a Constitutional

violation and that means that we have to overturn the conviction. That was the first argument. That was raised at the District Court level on habeas.

Now, the second argument, and that's contained at the end of their opinion, wasn't even raised at the District Court level, it wasn't raised until they got to the Circuit Court level on habeas.

And that was that the failure to inform the defendant of his rights pursuant to the Vienna Convention made his guilty plea involuntary and not a knowing and voluntary guilty plea. That was their argument.

The Court never ruled on that. What the Court said in Murphy versus Netherland was that it was procedurally defaultive because it wasn't raised until they actually got to the Circuit Court.

So there has been no ruling made. And that is as similar as I can get to what happened in this case. All of the cases, and there are only a handful of them, actually that have dealt with the Vienna Convention issue at all, basically are when the issues have been raised after conviction on either direct appeal or in habeas petitions and the Courts have dealt with them in that way.

This particular issue has never been raised

It's a case of first impression. Anywhere in the United States, Your Honor, it hasn't been raised in any other Circuits.

And essentially our argument in this case is that the defendant when you're interviewing and interrogating, conducting a custodial interrogation of a foreign national then his rights pursuant to the Vienna Convention are he has the right to notify the consulate from his country, should act as essentially a, in this case a sixth miranda right. There were five rights on the form. Sometimes the rights, I think in the original case there are four, but they're broken down into more. That it should operate as an additional if you want to call it a miranda right, before a statement can be knowing and voluntarily and intelligently made.

Our argument essentially goes along with Ms. Meleen's argument as to the knowing and voluntary and intelligent waiver of the miranda warnings and the rights that are given to a defendant in the case of miranda.

Now, anticipating the Court's question, why didn't the Court in miranda say then that a defendant should be read these rights.

I. I don't think that was an issue. Well, it

couldn't have been an issue because the miranda decision was in 1966 and the Vienna Convention was not ratified until 1969. So that's why it's not actually contained within the miranda opinion, Your Honor.

But it goes right along with Ms. Meleen's arguments as far as a knowing and voluntary and intelligent waiver would go when you're dealing with someone, a foreign national is someone who by definition is not from the United States, someone who in the specific facts of this case is not familiar with the law of the United States, is not familiar with such things as our Constitutional rights, as their right to remain silent.

The same reasoning for telling them that they have the right to contact a consulate, someone who is from their country who is aware and who can help out and explain to them, who can help get them an attorney, help get them counsel if they need it, help to advise them, someone that they can trust, someone who's from their country, not from the country, in this case the foreign country who is arresting him.

The same reasoning applies for telling the defendant of this right, as does giving him the miranda warnings, Your Honor. The Court in miranda held that the

prosecutor may not use statements stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effected to secure the privilege against self incrimination.

Your Honor, the privilege against self incrimination doesn't mean anything if the defendant doesn't understand when those statements can be used against him, that they can be used against him at trial, that a trial is coming, that they can be used against him to prove him guilty, that the burden of proof is beyond a reasonable doubt.

These are the kinds of things – and I know that what I last mentioned is not contained within the miranda warnings, but these are the kind of things and the reasons why we need the same procedural types of safeguards, to insure that if the United States especially in this case is going to go into another country, is going to abduct a person, bring him back to the United States for trial, that they question him on a plane before he can even get to the United States to see an attorney or speak with an attorney or speak with someone from his consulate.

The Vienna Convention article 36 specifically states that he should be informed of these rights without

delay. It ways that in fact twice, your Honor, in that code section. Never inform him of his rights before statements are taken. And these are obviously – whenever a statement is taken in a case that can be used against a person later whether it has exculpatory or inculpatory statements or both types of statements in it that person should understand what their rights are, they should be able to speak with – that's a very important part of the process Your Honor. They should be able to speak with their consulate before the decision of whether they want to talk or not is made so that they can ask him, they can give advise, he can hire an attorney and things like that.

For those reasons, Your Honor, we're asking to suppress the statements that were made. He wasn't ever informed. Mr. Horan, as is noted in our motion sent a letter dated July the 3rd, over a month after he had been arrested, abducted, flown to the United States and incarcerated here.

By that time all of their evidence had been taken. It was safe to say that it was – I think it's fair to say it was safer then to advise him of this rights then. That does not in any way comply with the Convention's mandate that he is informed of his rights.

without delay.

Informing him a month after he's been incarcerated and statements have already been taken and evidence has already been gathered does not even come close to complying with that.

And for those reasons, Your Honor, we would ask that you suppress the statement and finding that he was not informed of his rights pursuant to the Vienna Convention and essentially adding another prong onto the miranda warnings when a foreign national is being interrogated.

THE COURT: Are you aware of any case that has held that the Vienna Convention creates individual rights as opposed to expressing how nations deal with each other and with individuals?

MS. BARGER: A case that says that the Vienna Convention –

THE COURT: That says that it creates individual rights.

MS. BARGER: I'm sorry, that it creates individual rights.

THE COURT: That an individual is entitled to rely on the Vienna Convention is any process.

MS. BARGER: Your Honor, no, because there is no –

THE COURT: Okay. There has never been one?

MS. BARGER: There has never been one that I know of, Your Honor.

THE COURT: Okay. Any response?

MR. HORAN: Yes, Your Honor. The Mario Murphy against Netherland was a capital case and while it was decided by the 4th Circuit that the claim was procedurally defaultive the opinion is important for what Justice Luttig said about the supremacy clause. Justice Luttig said that the supremacy clause does not convert violations of treaty provisions regardless of whether those provisions can be said to create individual right into violations of Constitutional rights, just as a state does not violate a Constitutional right merely by violating a federal statute, it does not violate a Constitutional right merely by violation a treaty. And he cites Foster against Nealson, the 1829case that states that a treaty must be regarding in courts of justice as the equivalent of an act of the legislature.

The Vienna Convention simply doesn't create Constitutional rights. The exclusionary rule only applies

where Constitutional rights have been violated.

And Justice Luttig in his opinion could have been quoting from the preamble of the Vienna Convention on consular relations which in its preamble says this.

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations irrespective of their difference Constitution and social systems and realizing that the purpose of such privileges and immunities is not to benefit individuals but to insure the efficient performance of functions by consular posts on behalf of their respective states.

That language in the preamble along makes it clear that that convention is not creating individual rights, that convention is creating rights among nations and this defendant didn't get any individual right from the convention that he can rely on as being some sort of Constitutional mandate.

Your Honor is correct when you asked the question are there any cases that ever said that the Vienna Convention does what the defense is requesting here. And the answer is a resounding no.

And the reason the answer is a resounding no I

would suggest to the Court is because this treaty occupies the exact same legal status as an act of the legislature, it doesn't act as any Constitutional provision upon which this defendant can rely.

THE COURT: Anything else, Ms. Barger?

MS. BARGER: Your Honor, I just want to make clear what our position is. We are not saying that by violating the Vienna Convention that is a violation of the Constitution. That is not what our argument is.

Our argument is that when a foreign national is custodially interrogated not to inform him of his right to contact the consul from his Country makes the waiver of the miranda warnings which are the rights that are contained in the 5th Amendment invalid. It makes it so that it is not a knowing and voluntary and intelligent waiver. And that is what is required by the Court in the case of miranda.

Now, that issue was addressed again in the Murphy case where the Court said at the end of that case, and what Mr. Horan was quoting was what I had said to the Court earlier, their first claim that a violation of the convention of not informing the defendant of his rights pursuant to the Vienna Convention in and of itself was a

Constitutional violation. That's what the Judge was talking about and that's what the quote comes from, that part of the opinion.

There's a second issue and that was because you didn't read him his rights or tell him of his right to contact the consulate pursuant to the Vienna Convention his guilty plea was not a knowing and voluntary and intelligent guilty plea.

And that's as close to the argument that we're asserting that I can get. And the Court did recognize that that may have been a defense but said it was procedurally defaultive. It never ruled on it, Your Honor.

So that is the issue that we are addressing now. We are not arguing that the Vienna Convention creates a Constitutional right. What we're saying is that when you interrogate someone, when a police officer interrogates someone who is in custody that for the waiver of his 5th Amendment rights to be a knowing and voluntary and intelligent waiver as is prescribed by miranda he must be informed of his rights pursuant to the Vienna Convention to contact the consulate of his country.

THE COURT: I deny that motion to suppress. I

think although it's almost mathematical, I think I can show you that your argument is circular and can't lead anywhere because it just runs around in a circle and one piece of it depends on the other piece of it, depends on the other piece of it until you come back to the beginning.

The rights that miranda requires be informed and informantly waived are Constitutional rights. If the rights, if there are any, under the Vienna Convention are not Constitutional rights as beyond for adventure they are not, would have no more efficacy than a statute and you can't say that's something that ought to be put into miranda because miranda only talks about Constutional rights.

And if you're confused about what I said I think that demonstrates that your argument must fail, that particular argument. The best argument that you've got, and I can read this around the periphery, although it may have been the very point you were trying to make, although maybe you didn't try to make it as all and will wonder what I'm talking about. But what I think is the best argument is one of the factors that should be considered in considering voluntariness is whether he had some other

rights that were not taken account of. And maybe that's a factor, except for two things.

1. I find that the Vienna Convention does not create any individual rights. It's not an individual right treaty. It's a treaty between nations and it can't give rise to an individual right that an individual can claim.

But secondly and more importantly, at best it's only part of the picture here. And even if you include it in the totality of the circumstances his waiver of the Constitutional rights that he was clearly told about and that he clearly waived on the miranda form was a voluntary waiver of those rights.

And, again, his education is very important. If he didn't know anything about the Constitutional he sure didn't know anything about the Vienna Convention. But he was told these are rights that you have and you're waiving them and the fact that he wasn't told about some other right that you think he might have had doesn't affect the voluntariness in the totality of the circumstances of the waiver that he made.

I guess if anybody can make sense of that we can move on with it. But in any event, I deny that motion

to suppress.

And I just have one left so I guess that must be –

MS. MELEEN: You do, Your Honor. And that is entitled motion to dismiss the indictment, the one with the dismissal.

THE COURT: Okay.

MS. MELEEN: Your Honor, I intend to follow very closely with the memorandum in support of the motion on this one because it is difficult to articulate and very specific and so I intend to go through them at random with Your Honor.

Virginia Code 19.2-80 sets forth the requirements that a law enforcement officer making arrest under a capias which you will notice that the language of this is – I know a lot more than I did when I typed this, let's put it that way, Your Honor.

This is some of the information that we were trying to get as a result of our subpoena request and so you can set where we were at a disadvantage by not having this information.

But the argument goes that when an arrest is made the law enforcement officer is required to bring the